

Decisions of the United States Court of International Trade

(Slip Op. 01-118)

CHEFLINE CORP, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND
STAINLESS STEEL COOKWARE COMMITTEE, DEFENDANT-INTERVENOR

Court No. 00-05-00212

[Plaintiff's motion for judgment on the agency record affirmed-in-part and denied-in-part. Agency determination remanded for action consistent with this opinion.]

(Decided September 26, 2001)

Hogan & Hartson LLP (Lynn G. Kamarch, Craig A. Lewis), for Plaintiffs.

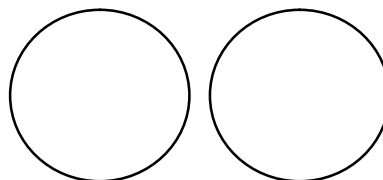
Lyn M. Schlitt, General Counsel; *Marc A. Bernstein*, Acting Assistant General Counsel; *Laurent M. de Winter*, Attorney, Office of General Counsel, U.S. International Trade Commission, for Defendant.

King & Spalding (Joseph W. Dorn, Stephen A. Jones, Christine E. Savage), for Defendant-Intervenor.

OPINION

POGUE, *Judge*: Plaintiffs Chefline Corporation, Inc., Daelim Trading Co., Ltd., Dong Won Metal Co., Ltd., Hai Dong Stainless Steel Co., Ltd., Kyung Dong Industrial Do., Ltd., Namyang Kitchenflower Co., Ltd., O'bok Stainless Steel Co., Ltd., and Sam Yeung Industrial Co., Ltd. (collectively, "Plaintiffs" or "Chefline"), move for judgment upon the agency record pursuant to USCIT Rule 56.2, challenging the U.S. International Trade Commission's ("Commission" or "ITC") final affirmative determination in the five-year administrative review ("sunset review") of antidumping and countervailing duty orders on top-of-the-stove stainless steel cookware from Korea and Taiwan.¹ *See Porcelain-on-Steel Cooking Ware from China, Mexico, and Taiwan*, and *Top-of-the-Stove Stainless Steel Cooking Ware from Korea and Taiwan*, USITC Pub. 3286, Inv. Nos. 701-TA-267 & 268 (Review) and 731-TA-297-299, 304 & 305 (Review) (March 2000) ("Review Deter-

¹ The purpose of a sunset review is to determine whether revocation of an antidumping or countervailing duty order would, within a reasonably foreseeable time, likely lead to continuation or recurrence of material injury. *See* 19 U.S.C. § 1675(c) (1994). A finding that material injury would likely continue or recur constitutes an "affirmative determination."



mination"). Defendant United States and Defendant-Intervenor The Stainless Steel Cookware Committee ("Committee"), an association of domestic producers of top-of-the-stove stainless steel cooking ware, oppose Plaintiffs' motion.

Plaintiffs challenge several aspects of the Review Determination, including, (1) the Commission's "domestic like product" determination, (2) the Commission's decision to cumulate subject imports from Korea and Taiwan, and (3) the Commission's determinations related to its finding of a likelihood of continuation or recurrence of material injury, namely, that, upon revocation of the orders, subject imports would likely increase to significant volume levels, would lead to significant underselling, price depression, and price suppression, and would have a significant adverse impact on the domestic industry. *See* Pl.'s Br. Supp. Mot. J. Agency R. ("Pl.'s Br.") at 1-4.

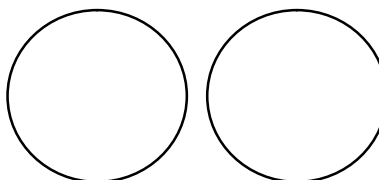
For the reasons discussed below, we affirm the Commission's "domestic like product" determination, and remand the Commission's decision to cumulate. The Commission's material injury determination will be reviewed after the remand results on the issue of cumulation are received.

BACKGROUND

In January 1987, the Commission determined that an industry in the United States was materially injured by reason of less than fair value ("LTFV") and subsidized imports of stainless steel cookware from Korea and Taiwan. *See Top-of-the-Stove Stainless Steel Cooking Ware from Korea and Taiwan*, USITC Pub. 1936, Inv. Nos. 701-TA-267-268 and 731-TA-304-305 (Final), (Jan. 1987) ("Original Determination"). The Department of Commerce ("Commerce") subsequently published antidumping and countervailing duty orders covering the subject merchandise. *See Certain Stainless Steel Cooking Ware from the Republic of Taiwan*, 52 Fed. Reg. 2,138 (Dep't Commerce Jan. 20, 1987) (antidumping duty order); *Certain Stainless Steel Cooking Ware from the Republic of Korea*, 52 Fed. Reg. 2,139 (Dep't Commerce Jan. 20, 1987) (antidumping duty order); *Certain Stainless Steel Cooking Ware from the Republic of Korea*, 52 Fed. Reg. 2,140 (Dep't Commerce Jan. 20, 1987) (countervailing duty order); *Certain Stainless Steel Cooking Ware from the Republic of Taiwan*, 52 Fed. Reg. 2,141 (Dep't Commerce Jan. 20, 1987) (countervailing duty order).

On February 1, 1999, the Commission instituted sunset reviews with respect to the orders covering the subject merchandise. *See Porcelain-on-Steel Cooking Ware from China and Taiwan*, 64 Fed. Reg. 4,896 (Int'l Trade Comm'n Feb. 1, 1999) (instituting five-year reviews). On May 7, 1999, the Commission decided to conduct full reviews with respect to all of the stainless steel cookware orders.² On March 17, 2000, the Commission determined that revocation of the countervailing and antidumping

² A full review includes a public hearing, the issuance of questionnaires, and other procedures. Expedited reviews do not include such procedures. *See* 19 U.S.C. § 1675(c)(3); 19 C.F.R. §§ 207.62-207.68 (1999).



duty orders covering top-of-the-stove stainless steel cookware from Korea and Taiwan would likely lead to continuation or recurrence of material injury in the United States within a reasonably foreseeable time. *See* Review Determ. at 1. Therefore, the antidumping and countervailing duty orders remain in place. *See* 19 U.S.C. § 1675(d)(2).

STANDARD OF REVIEW

The court will uphold a determination by the Commission unless it is unsupported by substantial evidence in the administrative record or is otherwise not in accordance with the law. *See* section 516a(b)(1)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

Substantial evidence is “something less than the weight of the evidence.” *Consolo v. Federal Mar. Comm’n*, 383 U.S. 607, 620 (1966). Nonetheless, the Commission must present “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Gold Star Co. v. United States*, 12 CIT 707, 709, 692 F. Supp. 1382, 1383–84 (1988) (internal quotation omitted), *aff’d sub nom. Samsung Elec. Co. v. United States*, 873 F.2d 1427 (Fed. Cir. 1989). The possibility of drawing two inconsistent conclusions from the same evidence does not mean that the agency’s finding is unsupported by substantial evidence. *See Consolo*, 383 U.S. at 620. In other words, the ITC’s determination will not be overturned merely because the plaintiff “is able to produce evidence * * * in support of its own contentions and in opposition to the evidence supporting the agency’s determination.” *Torrington Co. v. United States*, 14 CIT 507, 514, 745 F. Supp. 718, 723 (1990) (internal quotation omitted), *aff’d*, 938 F.2d 1276 (Fed. Cir. 1991).

DISCUSSION

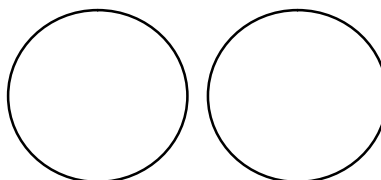
I. The Commission’s “Like Product” Determination

To determine whether an industry in the United States is materially injured or threatened with material injury by reason of imports of the subject merchandise, the ITC must first define the “domestic like product” and the “industry” producing the product. *See* 19 U.S.C. §§ 1673(2), 1677(4), 1677(10) (1994).

Section 1677 defines “domestic like product” as “a product which is like, or in the absence of like, most similar in characteristics and uses with the article subject to an investigation.” 19 U.S.C. § 1677(10). In turn, the relevant “industry” is defined as the “producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product.” 19 U.S.C. § 1677(4)(A).

In its final five-year review determinations, Commerce defined the subject merchandise as:

top-of-the-stove stainless steel cookware from Korea and Taiwan. The subject merchandise is all non-electric cooking ware of stainless steel which may have one or more layers of aluminum, copper or carbon steel for more even heat distribution. The subject merchandise includes skillets, frying pans, omelette pans, saucepans,



double boilers, stock pots, dutch ovens, casseroles, steamers, and other stainless steel vessels, all for cooking on stove top burners, except tea kettles and fish poachers.

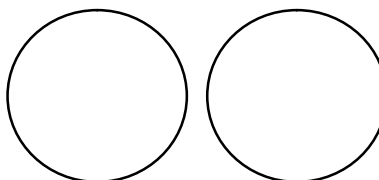
Top-of-the-Stove Stainless Steel Cookware From South Korea, 64 Fed. Reg. 48,374, 48,375 (Dep't Commerce Sept. 3, 1999) (final results CVD sunset review); *Top-of-the-Stove Stainless Steel Cookware From Taiwan*, 64 Fed. Reg. 48,372 (Dep't Commerce Sept. 3, 1999) (final results CVD sunset review); *Top-of-the-Stove Stainless Steel Cookware From the Republic of Korea and Taiwan*, 64 Fed. Reg. 40,570 (Dep't Commerce July 27, 1999) (final results AD sunset reviews).

In its Review Determination, the Commission found that the appropriate like product corresponding to the subject imports of top-of-the-stove stainless steel cookware is domestic top-of-the-stove stainless steel cookware. See Review Determin. at 9. The Commission used the same like product definition that the Commission had adopted in the Original Determination. See Original Determin. at 4.

Chefline opposes the Commission's determination as too narrow, and claims that "the domestic like product includes competing categories of stove top cookware produced from all metals, including aluminum." See Pl.'s Br. at 20. Chefline challenges the Commission's determination in two ways. First, Chefline argues that the Commission acted contrary to law insofar as it "applied a rebuttable presumption that the domestic like product determination made in the original investigation should continue to apply." Pl.'s Br. at 1. Second, according to Chefline, the Commission's determination that there is a "clear dividing line" between stainless steel cookware and all other metallic cookware is not supported by substantial evidence, or otherwise not in accordance with law. See *id.* at 1-2.

A. The Commission's Interpretation of the Role of the Original Determination is in Accordance with Law

19 U.S.C. § 1675a(a)(1)(A) directs the Commission to "take into account its prior injury determinations * * *." There is, however, no presumption that the former determination is controlling. See *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT 634, 638 n.5, 693 F. Supp. 1165, 1169 n.5 (1988) ("[E]ach finding as to like product must be based on the particular record at issue including the arguments raised by the parties."). The Commission has interpreted § 1675a(a)(1)(A) to include its prior like product determinations. See Review Determin. at 7; see also, e.g., *Stainless Steel Plate from Sweden*, USITC Pub. 3204, Inv. No. AA-1921-114 (Review) at 8 (July 1999). The Commission "may revisit its like product determination when there have been significant changes in the products at issue since the original investigation * * *." *Rules of Practice and Procedure*, 63 Fed. Reg. 30,599, 30,602 (Int'l Trade Comm'n June 5, 1998). Here, the Commission did revisit its original like product determination, and concluded that "[t]he record * * * does not provide any reason to depart from the finding in the original investigation that domestically produced top-of-

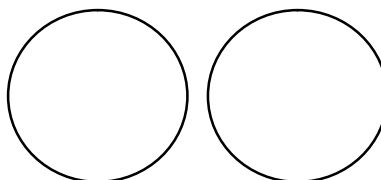


the-stove stainless steel cookware is the like product for the subject merchandise.” Review Determ. at 9.

Cheflene does not challenge the Commission’s interpretation of the statute to include a prior like product determination, but asserts that the Commission acted contrary to law because, rather than “revisiting” the like product issue, it “improperly presumed the continued applicability of its original like product determination * * *.” Pl.’s Br. at 24. It is well established that, “because of the factual nature of such investigations, a domestic like product finding in one investigation is not dispositive of another like product investigation.” *Acciai Speciali Terni S.p.A. v. United States*, 24 CIT ___, ___, 118 F. Supp. 2d 1298, 1304 (2000) (citing *Nippon Steel Corp. v. United States*, 19 CIT 450, 454–55 (1995)) (“AST”).

It is apparent from the Review Determination, however, that the Commission did not consider the like product finding of the Original Determination to be either “dispositive” or to create a “rebuttable presumption” for purposes of the sunset review; rather, it regarded it as its “starting point.” Review Determ. at 7. This interpretation is entirely consistent with the statute’s directive to take prior findings “into account,” and Cheflene itself agrees that the prior like product finding is “relevant” to the like product finding in the sunset review. Pl.’s Br. at 24; *see also AST*, 24 CIT at ___, 118 F. Supp. 2d at 1304–05 (“Where, as here, the ITC has addressed similar or identical facts, no statute or case authority prohibits it from drawing upon its previous work in addressing the issue at hand * * *. In fact, to find otherwise would require the ITC to ignore its institutional experience and make each like product determination in a vacuum—an impractical conclusion which cannot be reasonably endorsed.”).

Moreover, it is clear that the Commission in fact considered changes in the product or industry, and thus “revisited” the like product issue in some meaningful way. The Commission noted Cheflene’s disagreement with maintaining the original like product determination, *see* Review Determ. at 7, and emphasized that it had “considered the similarities between top-of-the-stove stainless steel and aluminum cookware.” *Id.* at 10; *see also Porcelain-on-Steel Cooking Ware from China, Mexico, and Taiwan, and Top-of-the-Stove Stainless Steel Cooking Ware from Korea and Taiwan*, USITC Pub. INV-X-046, Inv. Nos. 701-TA-267 & 268 (Review) and 731-TA-297-299, 304 & 305 (Review) at I-18 – I-30 (March 2000) (“Confidential Report”). Indeed, the Commission stated that it considered the changes in the product and industry “to be most pronounced in the comparison of top-of-the-stove stainless steel cookware with aluminum cookware.” Review Determ. at 9 n.47. The Commission also made clear that it based its like product determination on the “relevant factors in *this* review,” *id.* at 10 (emphasis added), thus indicating that it had not simply adopted the like product finding of the Original Determination, or presumed it to continue to apply.



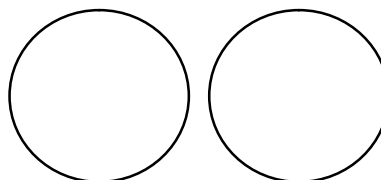
Cheffline further claims that, as a result of the Commission's presumption that the original like product determination continued to apply, it "failed to give sufficient consideration to intervening changes in the product and industry." Pl.'s Br. at 24. Because this is a claim that the Commission did not offer substantial evidence to support its conclusion that these changes did not affect the original like product determination, it is addressed below.

B. The Commission's Like Product Determination is Supported by Substantial Evidence and Otherwise in Accordance with Law

The Commission's decision regarding the appropriate domestic like product is a factual determination, in which the Commission applies the statutory standard on a case-by-case basis. *See, e.g., Torrington Co. v. United States*, 14 CIT 648, 652 n.3, 747 F. Supp. 744, 749 n.3 (1990), *aff'd*, 938 F.2d 1278 (Fed. Cir. 1991); *Asociacion Colombiana*, 12 CIT at 638 n.5, 693 F. Supp. at 1169 n.5. We review the Commission's determination for substantial evidence, bearing in mind that "it is not the province of the courts to change the priority of the relevant like product factors or to reweigh or judge the credibility of conflicting evidence." *Chung Ling Co. Ltd. v. United States*, 16 CIT 636, 648, 805 F. Supp. 45, 55 (1992); *see also NEC Corp. v. United States*, 22 CIT 1108, 1111, 36 F. Supp. 2d 380, 384 (1998) (holding that whether the differences between products are minor or significant is a factual determination within the discretion of the Commission). Furthermore, "[t]he finding of some similarities among the products delineated by the Commission is not sufficient to overturn the determination[] when there is otherwise substantial evidence to support its findings." *Torrington*, 14 CIT at 656, 747 F. Supp. at 753.

The ITC has generally sought "clear dividing lines" between domestic product groups, disregarding minor variations. *See, e.g., Aramide Maatschappij V.O.F. v. United States*, 19 CIT 884, 885 (1995); *Nippon Steel Corp. v. United States*, 19 CIT 450, 455 (1995). Factors that the ITC typically considers in defining "like product" include: (1) physical appearance, (2) interchangeability, (3) channels of distribution, (4) customer perceptions, (5) common manufacturing facilities and production employees, and, where appropriate, (6) price. *See Torrington Co.*, 14 CIT at 652, 747 F. Supp. at 749. In this case, the Commission found "significant differences" between domestic top-of-the-stove stainless steel and aluminum cookware, citing in particular different physical characteristics and end uses, limited interchangeability, different channels of distribution, and the lack of common manufacturing facilities, equipment and workers. *See Review Determin.* at 9-10, citing *The Cook's Wares*, Consumer Reports, P.R. Doc. No. 201,³ Nov. 1998, at 40, 43 (indicating greater heat conductivity of aluminum cookware); *Hearing Tr.*, P.R. Doc. No. 180 at 21, 24, 74 (March 3, 2000) (indicating that alumi-

³ Cites to the administrative record specify whether reference is made to a public document ("P.R.") or to a confidential document ("C.R.").

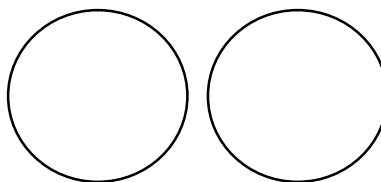


num offers even heat distribution, may be treated with nonstick coatings, and is superior to stainless steel for frying, while stainless steel is dishwasher safe and is superior in durability and non-reactivity with food); Cookware Manufacturers' Association, *CMA Guide to Cookware and Bakeware*, P.R. Doc. No. 134 at Ex. 4 (discussing the use, care, and characteristics (including heat conductivity, use of nonstick coatings, and durability) of cookware made of different materials); Confidential Report at I-21 – I-22 (stating that “equipment and workers used in the production of top-of-the-stove stainless steel cookware could not be used to produce other types of cookware”); Public Staff Report, *Porcelain-on-Steel Cooking Ware from China, Mexico, and Taiwan, and Top-of-the-Stove Stainless Steel Cooking Ware from Korea and Taiwan*, USITC Pub. No. 3286, Inv. Nos. 701-TA-267 & 268 (Review) and 731-TA-297-299, 304 & 305 (Review) at I-16 (March 2000) (“Public Report”) (noting same); Confidential Report at I-24, Public Report at I-18 (noting that distribution of stainless steel top-of-the-stove cookware is concentrated in direct sales, while distribution of aluminum cookware is concentrated in retail sales).

The Commission noted some “similarities” between the two products, such as purchaser responses indicating that all categories of cookware are essentially substitutable, and product information suggesting that the prices charged for stainless steel and aluminum cookware overlap to a large extent. *See* Review Determ. at 10. Nonetheless, the Commission concluded that a “clear dividing line” exists between domestic stainless steel cookware and domestic aluminum cookware. *Id.*

Cheflene argues that the Commission’s conclusion was “based on trivial or meaningless distinctions between the products and * * * ignored the overwhelming evidence of a nearly complete overlap between the product categories with regard to each of the Commission’s traditional six like product factors.” Pl.’s Br. at 24. In a like manner, Cheflene claims that the Commission “failed to give sufficient consideration to intervening changes in the product and industry.” *Id.*

Despite Cheflene’s assurances to the contrary, *see* Pl.’s Reply Br. at 25–27, it is difficult to understand how asking the Court to decide that distinctions the Commission regarded as “significant” are, in fact, “trivial or meaningless,” or to decide that the Commission “failed to give sufficient consideration” to certain evidence, is not asking the court to reweigh that evidence, “and generally substitute the court’s judgment on factual matters committed to the Commission’s expertise and role as the finder of fact.” *Chung Ling*, 16 CIT at 649, 805 F. Supp. at 55–56. Cheflene’s claimed evidence of some “overlap” between domestic products similarly fails to invalidate the Commission’s findings, if those findings are otherwise supported by substantial evidence. *See Torrington*, 14 CIT at 656, 747 F. Supp. at 753. As to Cheflene’s assertion that the Commission “ignored” the evidence of overlap, it is well established that, “absent a showing to the contrary, the agency is presumed to have considered all of the evidence in the record.” *USEC, Inc. v. United*



States, slip op. 01-58, at 7 (CIT May 17, 2001) (citing *Nat'l Ass'n of Mirror Mfrs. v. United States*, 12 CIT 771, 779, 696 F. Supp. 642, 648 (1988)). The evidence in the record reflects sufficient differences in characteristics, end uses, and production and distribution processes to support the Commission's determination that there exists a "clear dividing line" between domestic stainless steel cookware and domestic aluminum cookware.

Cheffline also asserts that the ITC, in making its like product determination, departed from its prior practice "by arbitrarily dividing a single continuum of products." Pl.'s Reply Br. at 2. According to the "continuum principle":

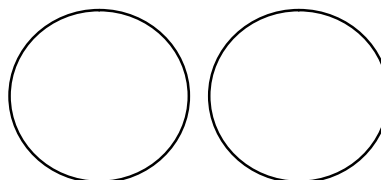
[M]inor physical differences in a product should not be permitted to obscure competitive realities. Accordingly, if there is a "continuum" of products slightly distinguishable from each other, among which no clear dividing lines can be drawn based on characteristics and uses, the Commission will treat the merchandise as a single like product. * * * The focus of the "like product" analysis therefore should be on competition in the marketplace and whether the domestic article competes with, and is in a position to be injured by, the imported article.

Pl.'s Reply Br. at 4-5 (quoting *Legal Issues in Certain color Television Receivers from the Republic of Korea and Taiwan*, USITC Pub. GC-G155, Inv. Nos. 731-TA-134 & 135 (Mem. from Gen. Counsel) at 10-11 (June 1983)). Cheffline maintains that, if the Commission had followed its previous practice, it would have included domestic aluminum cookware in the "domestic like product."⁴ *Id.* at 11.

Cheffline's claim of departure from prior practice would perhaps have merit if it were the case that the Commission found a "continuum" of domestic products, then "artificially divided" it by ignoring "minor differences" or "competitive realities." Here, however, the Commission concluded that the differences between domestic aluminum and stainless steel cookware are significant, and that therefore there is not a "continuum" of products, but rather a "clear dividing line" between them. Cheffline's simple disagreement with the Commission's conclusion is not a reason to disturb the Commission's holding, for "[i]t is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence." *Maine Potato Council v. United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985).

Having carefully reviewed the Review Determination and the underlying record, this Court concludes that the Commission's determination

⁴To the extent that Cheffline is asserting that the Commission departed from a prior practice of defining "like product" more broadly than it did here in similar cases, this court recently held that there is no support in the legislative history or case law for the view "that the Commission should seek to define the 'domestic like product' broadly. Rather, this authority simply cautions that the ITC should not define the domestic industry too narrowly, since to do [so] might deny relief to an industry adversely affected by unfairly-traded imports." *AST*, 24 CIT at ___, 118 F. Supp. 2d at 1303. Cheffline points in vain to cases that resulted in like product determinations that it perceives to be "broader" in a way favorable to its cause. See Pl.'s Reply Br. at 6-12. "These dissimilar results demonstrate that every like product determination must be based on the particular record at issue and the unique facts of each case." *NEC*, 22 CIT at 1111, 36 F. Supp. 2d at 384.



that domestic stainless steel cookware is the domestic like product is supported by substantial evidence. Cheflene has presented no argument that demonstrates that the Commission drew an invalid conclusion from the evidence on the record; Cheflene succeeds only in showing that a different conclusion could have been drawn from this evidence.

II. The Commission's "Cumulation" Determination

The statute provides that:

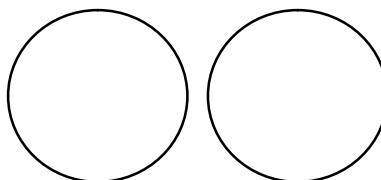
The Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which the reviews under section 1675(b) or (c) of this title were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market. The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.

19 U.S.C. § 1675a(a)(7). In the Review Determination, as it had in the Original Determination, the Commission decided to cumulate imports of the subject merchandise from Korea with those from Taiwan. *See* Review Determin. at 23–26.

Cheflene objects to the Commission's cumulation decision on two grounds: first, that the Commission failed to provide substantial evidence in support of its conclusion that there is a reasonable overlap of competition between imports from Korea and imports from Taiwan, *see* Pl.'s Br. at 39–42; and second, that the Commission acted contrary to law in failing to explain its conclusion that "the Prevailing Commissioners did not find that the subject imports [from either of the subject countries] are likely to have no discernible adverse impact on the domestic industry if the orders are revoked." *See id.* at 43–44; Review Determin. at 24.

Defendant responds first to the latter charge, asserting that it based its conclusion of "discernible adverse impact" on "findings [that] appear throughout the Commission's discussion of cumulation." Def.'s Mem. Opp. Pl.'s Mot. J. Agency R. ("Def.'s Mem.") at 38. Defendant is apparently referring to a section called "Other Considerations," *see* Review Determin. at 25–26, that lists the findings Defendant avers support the Commission's conclusion. *See* Def.'s Mem. at 38–40. While these "other considerations" may be legitimately viewed as addressed to the "no discernible adverse impact" provision, *see* Review Determin. at 25 n.166 (comparing the majority's analysis in the section to that of Chairman Bragg's dissenting views on "no discernible adverse impact"), the Commission's findings do not provide substantial evidence in support of its conclusion that the subject imports from each country are likely to have a discernible adverse impact on the domestic industry if the orders are revoked.

The Commission made three findings in support of its conclusion. First, that Korean and Taiwanese manufacturers had demonstrated an



ability to increase their exports to the United States market when conditions warrant, *see* Review Determ. at 25–26; second, that the cookware industries in Korea and Taiwan are export oriented, *see id.* at 26; and third, that both Korean and Taiwanese cookware is present in the direct sales channel of distribution and those producers have the incentive to increase sales into that channel in competition with the bulk of domestic products. *See id.*

This court has explained that, pursuant to 19 U.S.C. § 1675a(a)(7):

[A]n affirmative finding of discernible impact is only part of the answer to the question of whether cumulation is precluded. In other words, the first question is whether the imports are likely to have any such impact. If not, the ITC is precluded from cumulating. If yes, then the question remains whether that impact is also adverse.

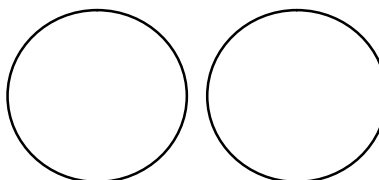
Neenah Foundry Co. v United States, slip op. 01–77, at 17–18 (CIT June 25, 2001). The Court will not simply assume that any discernible impact is necessarily adverse. *See id.*

Upon review, this Court concludes that the Commission has failed to provide substantial evidence for its conclusion that Taiwanese imports of subject merchandise would have even a discernible impact on the domestic industry, much less an impact that would be adverse. The United States industry, as acknowledged by the Commission, produces *only* high-end top-of-the-stove stainless steel cookware. *See* Review Determ. at 24. Taiwan, on the other hand, exports primarily low-end and mid-range products to the United States. *See id.* at 24, Table I–4 (revealing substantially lower total value and average unit value for Taiwanese imports compared to Korean imports).⁵ Thus, even if the Taiwanese industry is able to increase exports to the United States market and is in fact “export oriented,” these findings, standing alone, do not establish that Taiwanese exports would be of high-end products, such that they would impact the domestic industry at all, much less adversely.

Further, the Commission cites *no* relevant evidence in support of its finding that Taiwanese producers have an incentive to increase sales in the direct sales channel.⁶ And while there is some evidence that Taiwanese products have been sold to distributors considered to engage in direct sales, *see* Review Determ. at 25 n.164, there is insubstantial evidence to support the Commission’s related finding that Taiwan exports high-end cookware such that it would compete with and harm the domestic industry. *See id.* at 24–26 & n.160. The Commission relies on the evidence cited in its “reasonable overlap of competition” analysis to support this finding. *See id.* at 24–25 & n.160. This analysis recognizes

⁵ Nowhere in its determination is there any indication that the Commission relied on competition between low-end and high-end products. Rather, the Commission determined that “[t]he most notable change since the original determination is that the remaining domestic producers make only high-end top-of-the-stove stainless steel cookware.” Review Determ. at 24. Moreover, the Commission noted that “nonsubject imports, which were primarily low-end and mid-range products from China, India, Indonesia, and Thailand, accounted for a large and growing share of the U.S. market, in terms of both volume and value. We find that this low-end and mid-range merchandise competes with the domestic like product to a lesser degree.” Review Determ. at 28.

⁶ The evidence establishes only that non-subject countries produce low-end and mid-range products, and says nothing to indicate that the Taiwanese response would be to upgrade its product rather than compete with the non-subject countries. *See* Hearing Tr. at 57, 121–23; Field Trip Notes, C.R. Doc. No. 246 (Jan. 21, 2000).



that “[s]ubject imports from Taiwan have a low average unit value relative to subject imports from Korea and the domestic like product, which suggests a preponderance of low-end and mid-range products,” yet concludes that “subject merchandise from Taiwan includes at least some high-end cookware.” *Id.* at n.160.

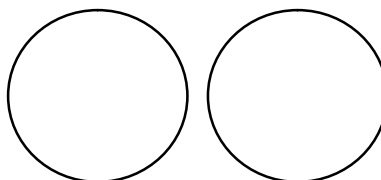
The Commission first cites testimony from the president of domestic producer and Committee member Regal Ware, who states, “[T]o the best of my knowledge, there are no Taiwanese specific cook ware set programs. There are Taiwanese pieces of cook ware that are sold through direct sales and add on. It *may* be a premium that goes with a set.” Hearing Tr. at 113 (emphasis added). While there may be pieces of Taiwanese cookware sold through the direct sales channel, this anecdotal testimony offers only speculative evidence that such cookware is high-end.⁷ In any event, even assuming there are some high-end imports of Taiwanese imports, there is no evidence that such imports would adversely affect the domestic industry.

The Commission next cites to the Committee’s Prehearing Brief, which makes the unremarkable observation that the higher unit value of some individual pieces in a set of Taiwanese cookware is not reflected in the average unit value of Taiwanese imports, which also includes lower-priced pieces such as lids and other parts of stainless steel cookware. See Committee Prehearing Br., C.R. Doc. No. 11 at 39, P.R. Doc. No. 134 at Ex. 15 (Jan. 11, 2000). The Committee presents import statistics that exclude Taiwanese imports valued at less than six dollars—a figure it deems “comparable” to the average unit value of Korean cookware⁸—and based on these statistics, urges that “the Commission should not infer from the low unit value of the imports from Taiwan that premium stainless steel cookware is not being imported from Taiwan.” Committee Prehearing Br., C.R. Doc. No. 11 at 39 (Jan. 11, 2000). While there may be some pieces of Taiwanese cookware that are priced higher than six dollars per unit, that fact is not meaningful when the comparison figure used is the *average* unit value for Korean cookware, which includes the same lower-priced pieces that were excluded from the Taiwanese statistics. The Committee’s statistics fail to make a fair comparison, and thus are not evidence that Taiwan is producing high-end stainless steel cookware.

Lastly, the Commission cites to an affidavit discussing []. See Committee’s Prehearing Br., C.R. Doc. No. 11 at Ex. 41. This is purely circumstantial evidence that Taiwanese producers export high-end subject merchandise to the United States, and, given the complete lack of direct

⁷ This testimony continues, “The real issue here is the fact that the Taiwanese do produce a product of equal quality * * *. And as we’ve talked about the Taiwanese products that are here at the end of the table, *although they are not cook ware products*, they are produced on the exact same equipment and produced in the exact same way, so that it would easily, easily transferrable from kitchenware to cook ware.” Hearing Tr. at 113 (emphasis added). Again, this evidence is purely speculative, and emphasizes the lack of concrete data or trends upon which to base the Commission’s finding that high-end cookware is or will be exported from Taiwan to the United States.

⁸ The Korean producers report that in 1998, the average unit value for Korean imports of the subject merchandise was \$9.25 per piece. See Korean Producers’ Response, P.R. Doc. No. 36 at 29 (Mar. 23, 1999); Review Determ. at Table I-4.



evidence to otherwise support this conclusion, cannot be deemed substantial.

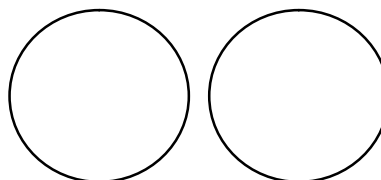
Though the Court recognizes that the Taiwanese producers did not cooperate in this investigation, the evidence on the record is simply not “such relevant evidence as a reasonable mind might accept as adequate to support” the Commission’s conclusion that high-end cookware is being, or will be, exported from Taiwan to the United States. *Gold Star*, 12 CIT at 709, 692 F. Supp. at 1383–84. Consequently, the Commission has failed to provide substantial evidence in support of its conclusion that subject imports from Taiwan are likely to have a discernible adverse impact upon the domestic industry if the orders are revoked. Furthermore, the Commission’s conclusion that there is a reasonable overlap of competition between Taiwanese and Korean and Taiwanese and domestic products relies to a great extent on finding that all three countries produce high-end merchandise. See Review Determ. at 24.

As to Korea, it is undisputed that most Korean exports are of high-end cookware, see Pl.’s Br. at 39, and that at least some Korean cookware is sold in the direct sales channel. See *id.* at 47. There is thus substantial evidence supporting the Commission’s conclusion that there would be a likely discernible impact on the domestic industry if the orders on Korean subject merchandise were revoked.⁹

Whether that impact would be adverse depends on the Commission’s findings regarding Korean export orientation and “flexibility to increase exports” of high-end products in a significant quantity and in a significant proportion through the direct sales channel such as to adversely affect the domestic industry. Review Determ. at 24. The purported ability of Korean producers to increase exports to the United States is based on evidence that imports of subject merchandise from Korea from all producers “increased by more than 70% in the first nine months of 1999,” compared to the same period in 1998, and that the imports from non-responding Korean producers increased during the same period by 146%. See Review Determ. at 26 n.167. Cheflene objects to the method used by the Commission to arrive at these figures, which subtracted the volume of imports of cookware reported by the responding firms from the total volume of imports under subheading 7323.93.0030, HTSUS, to arrive at the volume of subject imports from nonresponding firms. See Pl.’s Br. at 34; Def.’s Mem. at 34. Cheflene claims that the Commission’s method overstates the imports from non-responding producers. See Pl.’s Br. at 34.

The Court agrees that, on the basis of the record presented here, the methodology used by the Commission cannot be sustained, and orders

⁹This uncontested evidence also supports a finding that imports from Korea compete with domestic cookware, but, as described above, the Court cannot conclude that Korean imports and Taiwanese imports compete for purposes of a cumulation determination.

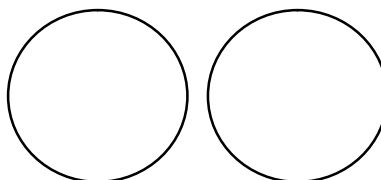


the Commission to address the issue on remand.¹⁰ Most importantly, the Commission used a similar calculation in the Original Determination, but adjusted the total volume of imports to account for the volume and quantity of non-subject merchandise classified under the equivalent subheading of the TSUS. *See* Original Determ. at A-34 & n.1, A-35 (Table 17) & n.1; Review Determ. at I-13 n.12 (noting that “subheading 7323.93.00 covers a range of products of stainless steel”). While it was reasonable for the Commission to rely on official import statistics given the lack of other data, it was not reasonable for the Commission to change its methodology without explanation. *See Allegheny Ludlum Corp. v. United States*, 24 CIT ___, ___, 112 F. Supp. 2d 1141, 1147 (2000).

Moreover, the evidence the Commission cites in support of its finding that imports from Korea increased shows that imports from the *responding* producers in fact *decreased* over the relevant time period. *See* Review Determ. at Table IV-6. This means that *all* of the substantial increase of imports of Korean cookware found by the Commission is attributable to *non-responding firms only*. Given that the classification statistics relied on include a variety of stainless steel products, the Commission should at least consider whether it accurately attributed all the imports not claimed by responding firms to non-responding firms, or whether some of the imports not claimed by responding firms were in fact not of the subject merchandise. The Commission should also consider whether using a value-based instead of a quantity-based statistic would, as Cheffline suggests, give a more accurate picture of imports of Korean subject merchandise. *See* Pl.’s Br. at 37.

On remand, the Commission is required to address the deficiencies in the evidence discussed above. The Commission must reconsider its finding that the subject imports from each country are likely to have a discernible adverse impact, and explain its finding in the manner described in *Neenah Foundry*. Further, the Commission must reconsider its finding that there is a reasonable overlap of competition between Korean and Taiwanese cookware and domestic and Taiwanese cookware, given the lack of substantial evidence that Taiwanese producers sell high-end products, and the scant evidence that Taiwanese producers sell through the direct sales channel of distribution. If the Commission decides not to cumulate, the Commission is instructed on remand to revisit its determination that revocation of the orders would, within a reasonably foreseeable time, likely lead to continuation or recurrence of material injury to the domestic industry, considering separately the likely volume, the likely price effects, and the likely impact of imports from Korea and Taiwan.

¹⁰ Defendant contends that Plaintiffs failed to exhaust their administrative remedies with regard to this issue. *See* Def.’s Mem. at 36-37. Plaintiffs assert, to the contrary, that they “had no opportunity to comment on this methodology at the administrative level since the first time these calculations were performed was in the context of the Commission’s [Remand Determination].” Pl.’s Br. at 33 n.93. The Court agrees with Plaintiffs that, even though the official import statistics were set forth earlier in the administrative process, Plaintiffs could not know how the Commission would use those statistics until the Review Determination was issued. Thus, there was no burden on the Plaintiff to object at an earlier stage.



CONCLUSION

The Commission shall reconsider its determination in a manner consistent with this opinion, pursuant to 19 U.S.C. § 1516a(c)(3). The Commission shall file its remand determination with the Court within 90 days. Plaintiffs are granted 30 days to file comments on the remand determination. The Commission may respond to any comments filed within 20 days.

(Slip Op. 01-119)

GOVESAN AMERICA CORP, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 97-10-01833

[Plaintiff's motion for summary judgment denied. Defendant's cross-motion for summary judgment granted. Judgment entered for Defendant.]

(Decided September 28, 2001)

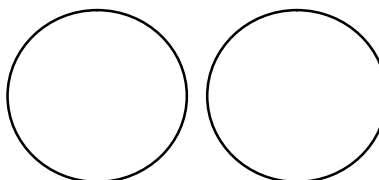
Ross & Hardies (Joseph S. Kaplan, Joshua P. Rubin); *Caramagno & Griffin* (William L. Griffin), Of Counsel, for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, *Mikki Graves Walser*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Chi S. Choy*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, Of Counsel, for Defendant.

OPINION

POGUE, *Judge*: Plaintiff, Govesan America Corp. ("Govesan"), challenges a decision of the United States Customs Service ("Customs") denying Plaintiff's protests filed in accordance with section 514 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514 (1994). At issue is the proper tariff classification under 19 U.S.C. § 1202, Harmonized Tariff Schedule of the United States ("HTSUS"), of Plaintiff's imports of powder paints from Spain.

Plaintiff claims that the subject merchandise is classifiable under subheading 3210.00.00, HTSUS, as "[o]ther paints and varnishes (including enamels, lacquers and distempers); prepared water pigments of a kind used for finishing leather." Merchandise classifiable under heading 3210 is subject to a 1.8% *ad valorem* duty rate. Customs liquidated the merchandise under heading 3907, HTSUS, as "Polyacetals, other polyethers and epoxide resins, in primary forms; polycarbonates, alkyd resins, polyallyl esters and other polyesters, in primary forms." The imported powders exist in three basic forms: epoxy-based, polyester-based and epoxy-polyester hybrids. The powders consisting principally of epoxide resins were classified under subheading 3907.30.00, HTSUS, which covers, "Polyacetals, other polyethers and epoxide resins, in pri-



mary forms: Epoxide resins,” dutiable at a rate of 6.1% *ad valorem*; the powders consisting principally of polyester were classified under subheading 3907.99.00 HTSUS, which covers, “polycarbonates, alkyd resins, polyallyl esters and other polyesters, in primary forms: Other,” dutiable at a rate of 2.2¢/kg plus 8.2% *ad valorem*. Hybrid resins were classified under subheadings 3907.30.00 or 3907.99.00, depending upon which resin (that is, epoxy or polyester) predominated by weight.

This court has jurisdiction pursuant to 28 U.S.C. § 1581(a)(1994). Customs’ classification is subject to *de novo* review pursuant to 28 U.S.C. § 2640. Before the Court are cross-motions for summary judgment made by Plaintiff and Defendant, the United States, pursuant to USCIT Rule 56.

STANDARD OF REVIEW

Under USCIT Rule 56, summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The court analyzes a Customs classification issue in two steps: “first, [it] construe[s] the relevant classification headings; and second, [it] determine[s] under which of the properly construed tariff terms the merchandise at issue falls.” *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citing *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997)). Whether the subject merchandise is properly classified is ultimately a question of law.¹ *See id.* Summary judgment of a classification issue is therefore appropriate “when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is.” *Id.*

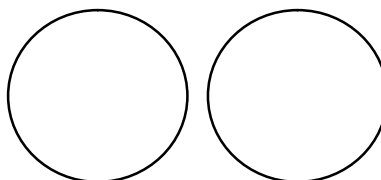
The merchandise at issue is synthetic thermosetting² polymer-based³ powder paint, or powder coating.⁴ *See* Pl.’s Mem. Supp. Mot. Summ. J. at 4 (“Pl.’s Mem.”); Esquivel Decl. at ¶11. The parties agree that the powder paints are made of epoxy resins, polyester resins, or a combina-

¹ Customs decided this case based on a standard classification ruling and did not utilize notice and comment procedures. Following the Supreme Court’s holding in *United States v. Mead Corp.*, 121 S. Ct. 2164 (2001), the Court does not afford the deference articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843–45 (1984), to Customs’ standard classification rulings. *Cf. United States v. Haggar Apparel Co.*, 526 U.S. 380, 389 (1999). Accordingly the Court defers to Customs’ classification ruling only to the extent it has the power to persuade. *See Heartland By-Products, Inc. v. United States*, slip op. 00–1287, 00–1289 (Fed. Cir. Aug. 30, 2001). Moreover, although there is a statutory presumption of correctness that attaches to Customs’ classification decisions, *see* 28 U.S.C. §2639 (a)(1), that presumption is not relevant where the Court is presented with a question of law in a proper motion for summary judgment. *See Universal Elecs.*, 112 F.3d at 492.

² Thermoset describes “any of a group of polymers that soften when initially heated, then harden and condense in bulk and retain a permanent shape; they cannot be softened or reprocessed by reheating.” *Academic Press Dictionary of Science and Technology* 2206 (1992).

³ A polymer is a “[s]ubstance made of giant molecules formed by the union of simple molecules * * *.” *McGraw-Hill Dictionary of Scientific and Technical Terms* 1462 (4th ed. 1989).

⁴ “Powder paints” and “powder coatings” are used interchangeably by both parties to describe the merchandise. *See* Pl.’s Mem. at 13; Bierwagen Aff. at ¶7; Rodriguez-Maceda Aff. at ¶19.



tion of epoxy and polyester (“hybrid”) resins⁵ in primary forms, together with pigments, extenders, modifiers, and cross-linkers or curing agents. *See* Pl.’s Stmt. Undisputed Facts (“Pl.’s Stmt.”) at ¶18; Def.’s Resp. Pl.’s Stmt. (“Def.’s Resp.”) at ¶18.

The parties also agree that powder paints are produced in a three-part manufacturing process involving blending, melting (extrusion), and grinding together all of the aforementioned components. *See* Pl.’s Stmt. at ¶¶24–27; Def.’s Resp. at ¶¶24–27. Furthermore, the parties agree that powder paints are applied to the substrate⁶ with an electrostatic spray nozzle/gun.⁷ The powder particles are charged electrostatically at the tip of the spray nozzle/gun and cling to the substrate, which has the opposite charge. *See* Pl.’s Stmt. at ¶8; Def.’s Resp. at ¶8. Heat is required to “cure” the applied powder paint, resulting in a thermoset coating. *See* Pl.’s Stmt. at ¶34; Def.’s Resp. at ¶31; Esquivel Dec. at ¶11. The primary purpose of the powder paint is to form this protective coating. *See* Pl.’s Stmt. at ¶¶30–31; Def.’s Resp. at ¶¶30–31.

Both parties agree on what constitutes the basic components of the paint and how it is used. Although the parties disagree as to whether the powder coating is “principally” made of plastic,⁸ our analysis leads us to conclude that there is no genuine issue of material fact regarding the composition of the subject merchandise and summary judgment, in favor of the Defendant, is appropriate.

DISCUSSION

The HTSUS consists of (A) the General Notes; (B) the General Rules of Interpretation; (C) the Additional U.S. Rules of Interpretation; (D) sections I to XXII, inclusive (encompassing chapters 1 to 99, and including all section and chapter notes, article provisions, and tariff and other treatment accorded thereto); and (E) the Chemical Appendix.

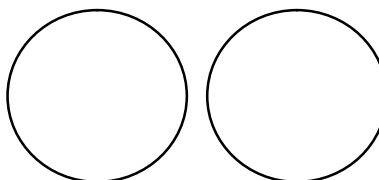
The General Rules of Interpretation (“GRI”) to the HTSUS govern the proper classification of all merchandise. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). GRI 1 is the first rule for determining classification cases and states, “for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *.” GRI 1, HTSUS; *see also Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998); Harmonized Commodity Description and Coding System, Explanatory

⁵ Resins are “any natural or synthetic organic compound consisting of a noncrystalline or viscous liquid substance.” *The New Encyclopedia Britannica* Vol. 9, 1038 (15th ed. 1986). Generally, the term resin is used “to designate any polymer that is a basic material for plastic.” IUPAC Congress/General Assembly, *Definition of Terms Relating to Reactions of Polymers and to Functional Polymeric Materials*, at 2.2 (July 2001), available at <http://www.iupac.org.html>; *see also Van Nostrand’s Scientific Encyclopedia* 2240, 2428 (7th ed. 1989); *McGraw-Hill*, *supra* note 3, at 1604. As a component of powder paints, resins help with adhesion, disperse pigment, and “tend to promote good, integral, functional properties, such as impact resistance.” *Figlioti Dep.* at 63.

⁶ A substrate is the “[b]asic surface on which a material adheres, for example, paint or laminate.” *McGraw-Hill*, *supra* note 3, at 1850.

⁷ Defendant refers to the electrostatic charging device as a “spray gun”; Plaintiff refers to it as a “spray nozzle.” *See* Pl.’s Stmt. at ¶30; Def.’s Resp. at ¶30.

⁸ Whether the subject merchandise consists principally of plastic is at issue because the Explanatory Note to Chapter 3210 specifically excludes “powder paints consisting principally of plastics,” and refers to Chapter 39, which covers “Plastics and Articles thereof” as the proper chapter for classification of such merchandise. *See* discussion *infra* note 13 and pp. 15–17.



Notes (2d ed. 1996) (“Explanatory Notes”) at GR 1(V) (“[T]he terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification.”). If the meaning of a term is in dispute, then the correct meaning is determined by the term’s common meaning. *See Sarne Handbags Corp. v. United States*, 24 CIT ___, ___, 100 F. Supp. 2d 1126, 1133 (2000). To determine the common meaning of a tariff term, the court may “rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information.” *Baxter Healthcare Corp. of Puerto Rico v. United States*, 182 F.3d 1333, 1338 (Fed. Cir. 1999) (quoting *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988)). A term’s common and commercial meanings are presumed to be the same. *See Carl Zeiss, Inc.*, 195 F.3d at 1379.

I. The subject merchandise is classifiable as “resins in primary form” under heading 3907, HTSUS.

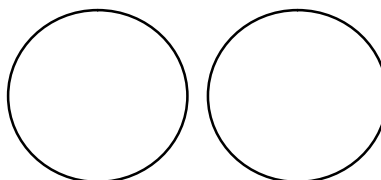
The terms of heading 3907, the Chapter Notes to Chapter 39, and the relevant Explanatory Note make clear that powder paints are *prima facie* classifiable under heading 3907, HTSUS. Heading 3907 includes “[p]olyacetals, other polyethers and epoxide resins, in primary forms: Epoxide resins,” 3907.30.00, HTSUS, and “polycarbonates, alkyd resins, polyallyl esters and other polyesters, in primary forms: Other,” 3907.99.00, HTSUS. Powder paints have as their main ingredient polymer resins that are either epoxy-based, polyester-based, or epoxy-polyester hybrids. *See* Def.’s Stmt. Material Facts (“Def.’s Stmt.”) at ¶10; Pl.’s Resp. Def.’s Stmt. (“Pl.’s Response”) at ¶10.

The Chapter Notes to Chapter 39 explain that resins in powder form are resins in “primary form.” Chapter 39, Note 6, HTSUS (explaining that the expression “primary forms” can apply to powders). The relevant Explanatory Note clarifies that, for purposes of Chapter 39, primary form powders:

may consist of [] unplasticised materials which become plastic in the moulding and curing process * * *; these materials may incorporate fillers * * *, colouring matter or other substances cited in Item (1) above. Powders may be used, for example, to coat objects by the application of heat with or without static electricity.

Explanatory Notes at 597.⁹ The additional materials cited in Item 1 include “substances necessary for [curing,] such as hardeners (cross-linking agents)” and “other materials such as plasticisers, stabilisers, fillers and colouring matter, chiefly intended to give the finished products special physical properties or other desirable characteristics.” *Id.* at 596.

⁹The Explanatory Notes “provide a commentary on the scope of each heading of the Harmonized [Tariff] System and are thus useful in ascertaining the classification of merchandise under the system.” H.R. Conf. Rep. No. 100-576, at 549 (1988), *reprinted in* 1988 U.S.C.A.N. 1547, 1582. It has long been established that, “[w]hile the Explanatory Notes do not constitute controlling legislative history, they do offer guidance in interpreting HTS[US] subheadings.” *Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995) (internal citations omitted); *Russell Stadelman & Co. v. United States*, 23 CIT ___, ___, 83 F. Supp. 2d 1356, 1359 n.6 (1999) (noting that Explanatory Notes help to define Congress’s intended meaning of a tariff term), *aff’d*, 242 F.3d 1044 (Fed. Cir. 2001).



Although Plaintiff and Customs agree that resins in primary form are the main ingredient of the powder paints, Plaintiff claims that once all the constituent materials—the resins, pigments, extenders and modifiers, and cross-linkers—are melted together and passed through the extruder, the resins are “consumed.” See Pl.’s Stmt. at ¶25–26. As a result, according to Plaintiff, the resins no longer exist in primary form. See *id.* at ¶42. Plaintiff further states that because other ingredients are necessary to the composition of the merchandise, the merchandise is “more than” just resins in primary form. See Pl.’s Mem. at 6–7.

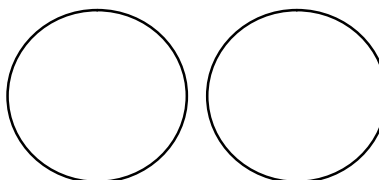
All of the materials in the powder paint are accounted for in the Explanatory Note, refuting Plaintiff’s argument that the merchandise cannot be classified as a primary form because it is “more than” just resins. Also, merely because materials other than resins are necessary ingredients of powder paints does not, as Plaintiff suggests, mean that the resins are not in primary form. Here the pigments impart color and the fillers produce desired shades and hues, see Pl.’s Stmt. at ¶18, and thus serve only to give the finished powder paint “special physical properties or other desirable characteristics,” as contemplated by the Explanatory Note.¹⁰ Explanatory Notes at 596.

Moreover, substances necessary for curing, such as the cross-linkers, are also specifically provided for by the Explanatory Note. See *id.* Both Plaintiff and Customs agree that although in the extrusion process the resins and cross-linkers are melted, the extrusion process is strictly controlled so that just enough heat is added to allow the pigments and extenders to be thoroughly dispersed throughout the powder paint, without causing the resins to cross-link.¹¹ See Esquivel Decl. at ¶9(b); see also Pl.’s Mem. at 8, Def.’s Reply Pl.’s Mem. at 17 (“Def.’s Mem.”).¹² It is during the thermosetting process that resins cross-link, and this process does not occur until the applied powder paints are cured. See Esquivel Decl. at ¶11. Because the resins only become cross-linked as part of the curing process, they are not “consumed” in the extrusion process, but rather may, although part of a finished, manufactured product, be considered “resins in primary form,” as that tariff term is properly in-

¹⁰ Plaintiff refers to powder coatings as “polymers which generally contain pigments, fillers and additives.” Govesan America Corp., *Powder Coating Seminar*, at Chap. 10, Def. App. At Ex. 5. The emphasis on “polymers” as the primary ingredient further supports this court’s analysis that the powder paints are resins in primary form.

¹¹ Cross-linking is defined as “the attachment of chains of a polymer to one another to make the polymer into a single network with increased strength and resistance to solvents.” *Academic Press Dictionary*, *supra* note 2, at 551.

¹² Plaintiff and Customs agree on the powder paint’s threestep manufacturing process, citing extensively to the declaration of Juan Esquivel, the Chief Chemist and Laboratory Director of Govesan, S.A., in support of their understanding of this manufacturing process. See Pl.’s Brief *passim*; Def.’s Brief *passim*. The parties do not, however, agree on how to define “primary form,” which is a question of law for the Court to decide.



terpreted.¹³ See Explanatory Note at 597 (noting that powders in primary form contain “unplasticised materials which become plastic in the moulding and curing process”); see also *Expancel, Inc. v. United States*, slip op. 00–19, at 6 n.5 (CIT Feb. 18, 2000) (holding that finished products may be considered primary forms); HQ 951239 (Aug. 11, 1992) (concluding that polyester/epoxy powder coatings like those at issue here meet the definition of the term “primary form”).

As additional support for this conclusion, the Explanatory Note describes exactly how the subject merchandise is used: the powder paint coats objects through the application of heat and static electricity. See Explanatory Notes at 597. Also, the Explanatory Notes to heading 3907 describe some of the uses of epoxide resins and certain polyesters, such as “alkyd resins” and “polyallyl esters,” to include surface-coatings, coatings and varnishes. See *id.* at 607; see also HQ 955334 (Mar. 10, 1995).¹⁴

It is clear from the terms of heading 3907, HTSUS, and the relevant Chapter and Explanatory Notes that Customs correctly classified powder coatings as “resins in primary form” under heading 3907, HTSUS.

II. Whether powder paints are also classifiable under 3210, HTSUS

Plaintiff suggests that powder paints are classifiable as “other paints” pursuant to 3210, HTSUS. We find that the subject merchandise is not *prima facie* classifiable under 3210, HTSUS, and thus we need not conduct a GRI 3 analysis to address whether heading 3907, HTSUS, or heading 3210, HTSUS, is more specific.¹⁵

The parties disagree over the meaning of the term “paint.” The meaning of a tariff term is a question of law. See *Brookside Veneer Ltd.*, 847 F.2d at 788. Nowhere in the statute or the legislative history is the term “paint” defined. We must therefore look to the common meaning of

¹³ Chapter Note 1 to Chapter 39 provides further support for the conclusion that the powder paints at issue are properly classified under heading 3907, HTSUS. Chapter 39 covers “Plastics and Articles thereof”; Chapter Note 1 defines “plastics” as “those materials of headings 3901 to 3914 which are or have been capable either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticiser) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence.” Chapter 39, Note 1, HTSUS. The powder paints, as “polyacetals, other polyethers and epoxide resins, in primary forms: Epoxide resins,” under 3907.30.00, HTSUS, and “polycarbonates, alkyd resins, polyallyl esters and other polyesters, in primary forms: Other” under 3906.99.00, HTSUS, are “materials of headings 3901 to 3914.” *Id.* The powder coatings contain thermosetting resins that are capable of being processed into a shape which is retained upon the removal of the external heat influence. See Esquivel Decl. at ¶11; see also Pl.’s Reply Br. at 13, 20; Def.’s Mem. at 18. Moreover, the Encyclopedia Britannica considers resins “not clearly differentiated from plastics.” *The New Encyclopedia Britannica*, *supra* note 5, at Vol. 9, 1038. Thus, the powder coatings are properly included in the statutory definition of “plastics.”

¹⁴ As discussed *infra*, the Explanatory Notes to subheading 3210, HTSUS, exclude these powder paints, specifically referring to Chapter 39 as the proper chapter for classification of the type of merchandise at issue. Subheading 3907, HTSUS, is the only possible heading under which the powder paints at issue could be classified in Chapter 39.

¹⁵ GRI 3 provides:

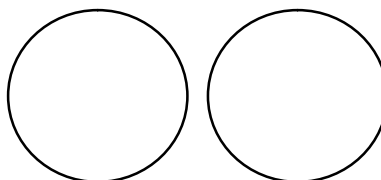
When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

GRI 3, HTSUS.



“paint” as defined by dictionaries, lexicographic and scientific authorities and other reliable sources. See *Baxter Healthcare*, 182 F.3d at 1338.

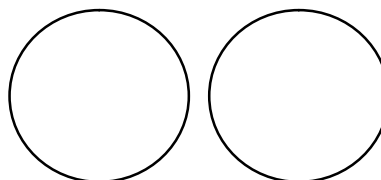
Plaintiff claims that paint is not limited to substances in liquid form. According to *Van Nostrand's Scientific Encyclopedia*, *supra* note 5, at 2117, “paint” is a term “used to describe a wide variety of materials designed to adhere to a substrate and act as a thin, plasticlike layer.” This court has previously accepted this definition of paint, as well as that portion of the *Van Nostrand's* definition that explains that “[p]aints are available for decorative, protective and other purposes. * * * Protective uses include shielding metals from corrosion [and] protecting plastics from degradation caused by ultraviolet light * * *.”¹⁶ *General Motors Corp. v. United States*, 15 CIT 372, 379, 770 F. Supp. 641, 647 (1991) (internal quotations and citations omitted), *rev'd on other grounds*, 976 F.2d 716 (Fed. Cir. 1992)). Plaintiff argues that according to these definitions, paint does not require a liquid medium.

Defendant, on the other hand, offers alternative dictionary definitions that do require “paints” to be in liquid form. According to *McGraw-Hill*, *supra* note 3, at 1356, paint is “[a] mixture of a pigment and a vehicle, such as oil or water, that together form a liquid or paste that can be applied to a surface to provide an adherent coating that imparts color to and often protects the surface.” The *Merriam Webster's Collegiate Dictionary & Thesaurus*, available at <http://www.m-w.com.html> (“Merriam Webster”), defines paint in relevant part as, “a mixture of a pigment and a suitable liquid to form a closely adherent coating when spread on a surface in a thin coat * * *.”

The Court is unable to discern the proper meaning of the term “paint” from these dictionary definitions. We therefore turn to the Explanatory Notes, *see supra* note 9, to clarify the meaning of that tariff term.

The Explanatory Note to heading 3210 excludes “[p]owder paints consisting principally of plastics and containing additives and pigments, used for application of static electricity” from that heading, and indicates that such merchandise is properly classified under Chapter 39. Explanatory Notes at 498 (emphasis added). In *H.I.M./Fathom, Inc. v. United States*, the court held that the Explanatory Notes are “persuasive authority for the Court when they specifically include or exclude an item from a tariff heading.” *H.I.M./Fathom*, 21 CIT 776, 779, 981 F. Supp. 610, 613 (1997) (citing *Bausch & Lomb*, 21 CIT at 174–75, 957 F. Supp. at 288). Applied here, the effect of the Explanatory Notes is to specifically *exclude* powder paints such as those at issue from the tariff heading: the subject merchandise consists of plastics, contains additives and pigments, and is applied through an electrostatic spray nozzle/gun. Moreover, the paints that are specifically *included* in the Explanatory Note to heading 3210 all require an aqueous, non-aqueous, or simply

¹⁶ The powder paints at issue are used to coat objects for industrial purposes, providing protection from environmental elements that would otherwise cause the substrate to rust or deteriorate. See *Rodriguez-Maceda Aff.* at ¶13. Govesan also produces powder coatings which provide ultra-violet protection and corrosion resistance. See Pl.'s Mem. at Ex. 2.



“liquid” medium.¹⁷ See Explanatory Notes at 496; see also HQ 085594 (Jan. 29, 1990) (concluding that to be included in heading 3210, goods must be “dispersed in a liquid medium”).

Plaintiff and Defendant disagree as to whether the powder paints consist principally of plastics. See Def.’s Stmt. at ¶10; Pl.’s Resp. at ¶10. As previously discussed, the subject merchandise is considered a plastic for classification purposes, and resins give the subject merchandise its plastic character. Resins are the largest single component of the subject merchandise, which contains more than fifty percent resins by weight. See Def.’s Stmt. at ¶10; Esquivel Decl. at ¶10 (tables).¹⁸ Because these resins are the main ingredient of the powder paints, the subject merchandise consists “principally” of plastics.¹⁹

In this case, the Explanatory Notes control our understanding of the tariff term “paint,” and lead us to conclude that the powder paints at issue are not properly considered “paint” for classification purposes. Consequently, the subject merchandise is not *prima facie* classifiable under heading 3210, HTSUS.

III. Whether parts of the affidavits or declarations submitted by Plaintiff should be stricken.

To the extent that the affidavits and declarations contain legal arguments and conclusions of law, this Court treats them as argument or disregards them as appropriate.

CONCLUSION

Pursuant to GRI 1, we find that the powder paints at issue are classifiable as “resins in primary form” under heading 3907, HTSUS, and are not classifiable as “other paint” under heading 3210, HTSUS. Summary judgment is accordingly granted for the Defendant.

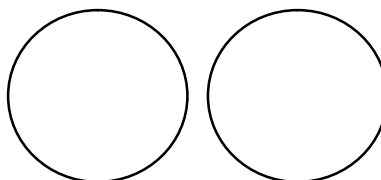
¹⁷ “Aqueous” means “[r]elating to or made with water.” See *McGraw-Hill*, *supra* note 3, at 114. “Nonaqueous” means “[p]ertaining to a solution or liquid containing no water.” See *id.* at 1280.

¹⁸ According to Juan Esquivel’s declaration the powder paints contain, approximately, the following amount of resins, by weight:

REB-8463	Epoxy Resin	58%		
REB-6484	Epoxy Resin	57%		
RPB-885	Polyester Resin	59%		
RPB-6358	Polyester Resin	57%		
RHB-754 (hybrid)	Polyester Resin	34%	Epoxy Hardner	22%
RHB-579 (hybrid)	Polyester Resin	56%	Epoxy Hardner	37%

Esquivel Decl. at ¶10 (tables).

¹⁹ Plaintiff argues that the powder paints “are not ‘principally’ comprised of epoxide, polyester, or hybrid resins even if the principal ingredient used to manufacture each coating is a polymer” because “[t]here is no primary or key ingredient which characterizes powder coatings.” Pl.’s Resp. at ¶ 10. This argument improperly tries to import the essential character analysis of GRI 3(b) by focusing on the “key ingredient” of the powder paints, rather than the ingredient that comprises the majority of the subject merchandise. “Principally,” in this case, means the chief ingredient. See *Merriam Webster*, *supra* page 15. Although the subject merchandise has a unique combination of ingredients, the interaction of all of which are necessary to the function of the powder paint, see *Figlioti Dep.* at 56–57, resins make up the largest percentage of the goods by weight. Therefore, the powder paints are primarily plastics, in the form of resins that can be heated in order to hold their shape. Consistent with this view, Customs originally classified the hybrid resins in accordance with which resin—epoxy or polyester—was principal, i.e., predominated by weight. See Chapter 39, Note 4, HTSUS. Plaintiff’s essential character analysis is therefore irrelevant.



(Slip Op. 01-120)

FUJIAN MACHINERY AND EQUIPMENT IMPORT & EXPORT CORP, AND
SHANDONG MACHINERY IMPORT & EXPORT CORP, PLAINTIFFS *v.* UNITED
STATES, AND UNITED STATES DEPARTMENT OF COMMERCE, DEFENDANTS,
AND O. AMES CO., DEFENDANT-INTERVENOR

Court No. 99-08-00532

[ITA antidumping duty determination sustained in part and remanded in part]

(Dated September 28, 2001)

Powell, Goldstein, Frazier & Murphy LLP (Lawrence R. Walders) for plaintiffs Fujian Machinery and Equipment Import & Export Corporation and Shandong Machinery Import & Export Corporation.

Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen*, Director, *Kenneth S. Kessler*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; Office of the Chief Counsel for Import Administration, United States Department of Commerce (*John F. Koeppen*), of counsel, for defendant.

Wiley, Rein & Fielding (Charles O. Verrill, Jr. and Eileen P. Bradner) for defendant-intervenor O. Ames Company.

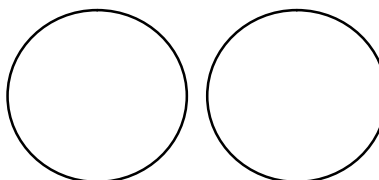
OPINION

GOLDBERG, *Judge*: In this action, the Court considers plaintiffs' challenges to the final results of the Department of Commerce ("Commerce") for the seventh administrative review of the antidumping duty order on heavy forged hand tools ("HFHTs"). *See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China; Final Results and Partial Recission of Anti-dumping Duty Admin. Reviews*, 64 Fed. Reg. 43,659 (August 11, 1999) ("*Final Results*"). Plaintiffs Fujian Machinery and Equipment Import & Export Corporation ("FMEC") and Shandong Machinery Import & Export Corporation ("SMC") argue that: (1) Commerce erred in determining that there was a total failure of verification at FMEC, SMC, and two of the supplier factories; (2) Commerce erred by denying plaintiffs' claims for separate company-specific dumping margin rates; and (3) Commerce acted unlawfully by using facts available, and in particular by applying adverse inferences, on the basis of alleged verification failures and subsequently discovered unreported sales.

The Court exercises jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (1994).

BACKGROUND

On March 23, 1998, Commerce initiated the seventh administrative review of HFHTs. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 63 Fed. Reg. 13,837 (March 23, 1998). With respect to the People's Republic of China ("PRC"), the review covered axes/adzes, bars/wedges, hammers/sledges, and picks/mattocks. *Id.* Commerce issued an initial set of questionnaires to plaintiffs on April 23, 1998. Supplemental questionnaires followed for SMC on August 7, 1998, for



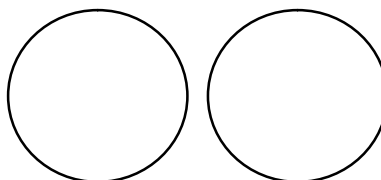
FMEC on August 10, 1998, and for both companies on September 15, 1998. SMC and FMEC timely responded to all questionnaires.

On September 24, 1998, Commerce faxed the verification outlines for SMC and FMEC to the Washington office of plaintiffs' counsel. Verification began at FMEC the morning of October 5, 1998, and lasted two days. Subsequently, Commerce conducted verification at SMC October 8–9, 1998, and at two of the plaintiffs' suppliers' factories the following week: [], termed "Factory A" by Commerce, on October 12–13, 1998; and [], termed "Factory B" by Commerce, on October 14–15, 1998 (collectively, the "Factories").

On January 29, 1999, Commerce issued an internal memorandum determining that FMEC, SMC,¹ Factory A, and Factory B had each failed verification. *See* App. ("Pls.' App.") to Pls.' Mot. for J. upon the Agency R. ("Pls.' Memo") 8, Determination of Adverse Facts Available Based on Verification Failure in the Admin. Review of HFHTs from the PRC ("AFA Memo"). On February 9, 1999, FMEC's counsel wrote to Commerce requesting an opportunity to provide information that the memorandum had identified as unavailable during FMEC's verification. *See* Pls.' App. 9, Heavy Forged Hand Tools From the PRC—Clarification of Verification ("FMEC's Add'l Submissions Letter"). On February 26, 1999, Commerce denied this request as untimely. *See* Pls.' App. 10, Anti-dumping Duty Admin. Review of HFHTs from the PRC (1997–1998) ("Commerce's Add'l Submissions Letter").

On February 5, 1999, Commerce published the preliminary results of the antidumping review. *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the PRC; Preliminary Results and Partial Recission of Antidumping Duty Admin. Reviews*, 64 Fed. Reg. 5,770 (February 5, 1999) ("Preliminary Results"). In the *Preliminary Results*, Commerce determined that sales of HFHTs from the PRC were made at less than fair value during the period of review, February 1, 1997, through January 31, 1998. *Id.* With respect to both FMEC and SMC, Commerce stated that "serious problems" at verification made it impossible to confirm that U.S. sales for either company were properly reported. *Id.* at 5,771. Commerce further determined that "the nature of the verification failures of both companies and the inadequacy of their cooperation" was such that neither FMEC nor SMC had established that it was entitled to a separate, company-specific rate, rather than the government-entity rate otherwise applicable to exporters in non-market economies that fail to demonstrate an absence of government control over their export activities. *Id.* at 5,772. Finally, Commerce concluded that the non-responsiveness of the PRC's Ministry of Foreign Trade and Economic Cooperation ("MOFTEC"), as well as the verification failures of FMEC and SMC, demonstrated that the "PRC entity" (including FMEC and SMC) had failed to cooperate to the best of its abil-

¹ The letter refers to SMC as "SMEC."



ity, and that application of adverse facts available (“AFA”) under 19 U.S.C. § 1677e(b) (1994) was therefore appropriate. *Id.*

On April 22, 1999, Commerce informed FMEC and SMC that a review by the U.S. Customs Service had disclosed several unreported sales of bars/wedges by both companies. FMEC and SMC filed comments explaining these unreported sales on May 10, 1999. *See* Pls.’ App. 11, Heavy Forged Hand Tools From China (“Pls.’ Unreported Sales Letter”). On August 3, 1999, Commerce issued a memorandum rejecting plaintiffs’ explanations. *See* Pls.’ App. 12, Antidumping Duty Admin. Review of HFHTs from the PRC (1997–1998)—Unreported Sales (“Commerce’s Unreported Sales Letter”).

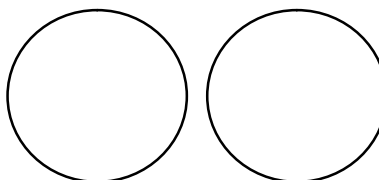
On August 11, 1999, Commerce published the *Final Results*, in which it again determined that FMEC, SMC, and their suppliers’ factories failed verification; that neither FMEC nor SMC warranted a separate rate; and that the application of AFA was appropriate. *See* 64 Fed. Reg. at 43,661–69. Commerce assigned FMEC and SMC the following PRC-wide dumping margins: for axes/adzes, 18.72%; for bars/wedges, 47.88%; for hammers/sledges, 27.71%; and for picks/mattocks, 98.77%. *Id.* at 43,672.

STANDARD OF REVIEW

The Court will sustain Commerce’s *Final Results* unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *accord Matsushita Elec. Indus. Co., Ltd. v. United States*, 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984). “[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966) (citations omitted).

While Congress has thus directed the Court to test whether Commerce’s *Final Results* are supported by substantial evidence, the Court of Appeals for the Federal Circuit has determined that a nominally different standard of review applies to one aspect of the methodology from which the *Final Results* are derived. In *Micron Tech., Inc. v. United States*, 15 Fed. Cir. (T) ___, 117 F.3d 1386 (1997), the Federal Circuit observed that although Congress has directed Commerce to “verify all information relied upon in making * * * a final determination in an investigation * * * [or] a final determination in a[n antidumping] review,” 19 U.S.C. § 1677m(i)(3) (1994),² Congress never defined what successful verification entails, 15 Fed. Cir. (T) at ___, 117 F.3d at 1394, and neither

² Congress’s directive to Commerce to verify information has not substantively changed between the pre-URAA law cited in *Micron Tech.*, 19 U.S.C. § 1677e(b) (1988), and the current codification, except that the latter no longer requires Commerce “to report the methods and procedures used to verify such information.” *Id.* That text was evidently deleted when Congress dropped the provision for using “best information available” in favor of “facts otherwise available,” the sanction that now applies when information cannot be verified. *See* 19 U.S.C. § 1677e(a)(2) (1994). In any event, a similar reporting requirement applies under Commerce’s own regulations. *See* 19 C.F.R. § 351.307(c) (2000).



Congress nor Commerce has either specified a particular verification methodology. *Id.* at 1395. Accordingly, the *Micron Tech.* court looked to the Supreme Court's decision in *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to derive the appropriate level of deference due Commerce's verification methodology. See 15 Fed. Cir. (T) at ___, 117 F.3d at 1394.

In *Chevron*, the Supreme Court observed:

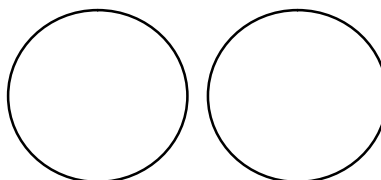
If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency is implicit rather than explicit. In such a case, the court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843–44 (footnotes omitted). Apparently in reliance on that language, the *Micron Tech.* court held, among other things, that “Congress has implicitly delegated to Commerce the latitude to derive verification procedures ad hoc. * * * Therefore, we review verification procedures employed by Commerce in an investigation for abuse of discretion,³ rather than against previously-set standards.” 15 Fed. Cir. (T) at ___, 117 F.3d at 1396 (footnote added).

Insofar as this holding was based on a *Chevron* analysis, two recent Supreme Court decisions call its vitality into question. In *Christensen v. Harris County*, 529 U.S. 576 (2000), the Supreme Court held that an agency's interpretation of an ambiguous statute is not entitled to *Chevron* deference when that interpretation is expressed informally, as through an opinion letter, rather than through a regulation adopted after formal adjudication or notice-and-comment rulemaking. *Id.* at 586–88.

More recently, in deciding whether Customs Service classification rulings deserved *Chevron* deference, the Supreme Court held that “administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *United States v. Mead Corp.*, 533 U.S. ___, ___, 121 S. Ct. 2164, 2171 (2001) (emphasis added). In *Mead*, the Court doubted that Congress had delegated to the Customs Service the authority to issue classification rulings with the force of law. 533 U.S. at ___, 121 S. Ct. at 2173–74. More importantly, the Court observed that the Customs Service itself did not appear to have “set out with a law-making pretense in mind” in issuing the rulings, as they were not issued after notice and comment and did not bind third parties. 533 U.S. at

³The arbitrary or capricious standard cited in *Chevron* and the abuse of discretion standard cited in *Micron Tech.* are identical. See Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1994) (requiring reviewing court to set aside agency findings that are “arbitrary, capricious, [or] an abuse of discretion”).



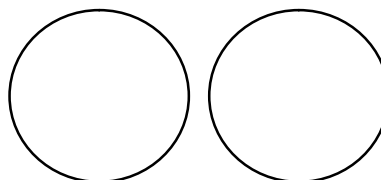
_____, 121 S. Ct. at 2174. Accordingly, the Court held that the classification rulings did not merit *Chevron* deference. 533 U.S. at _____, 121 S. Ct. at 2175. Instead, such rulings, like the opinion letters at issue in *Christensen*, warrant judicial respect to the extent they have the “power to persuade,” as determined by their “thoroughness, logic and expertness, [their] fit with prior interpretations, and any other sources of weight.” 533 U.S. at _____, 121 S. Ct. at 2175–76 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); see also *Christensen*, 529 U.S. at 587.

The proceedings in an antidumping investigation or administrative review constitute a very strange creature in the taxonomy of modern American administrative law. Congress has stated that such proceedings are “investigatory” rather than adjudicatory, see *NEC Corp. v. United States Dep’t of Commerce*, 21 CIT 933, 948–49, 978 F. Supp. 314, 329 (1997) (citing H.R. Rep. No. 96–317, at 77 (1979), and S. Rep. No. 96–249, at 100 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 486), *aff’d* 16 Fed. Cir. (T) _____, 151 F.3d 1361 (1998); see also Uruguay Round Agreements Act, Statement of Administrative Action (“SAA”), H.R. Doc. No. 103–316, at 892 (1994), although the Court of International Trade (“CIT”) has observed that in substance they are quasi-adjudicatory. See *GSA, S.R.L. v. United States*, 23 CIT _____, _____, 77 F. Supp. 2d 1349, 1359 (1999) (quoting *Monsanto Co. v. United States*, 12 CIT 937, 947, 698 F. Supp. 275, 283 (1988)). Given their anomalous classification, such proceedings may not constitute a suitable vehicle for Commerce to express statutory interpretations worthy of *Chevron* deference, particularly with respect to their more investigatory aspects, such as the conduct of verification.⁴ If Congress’s delegation of authority to Commerce to derive a verification methodology is “implicit,” and if that methodology is derived “ad hoc” and does not give rise to “set standards,” see *Micron Tech.*, 15 Fed. Cir. (T) at _____, 117 F.3d at 1396, then Commerce does not “set out with a rulemaking pretense in mind” when it decides on a methodology for a given proceeding.⁵ *Cf. Mead*, 533 U.S. at _____, 121 S. Ct. at 2174. Thus, any statutory interpretation that Commerce expresses under such circumstances should not merit *Chevron* deference.⁶ *But cf. U.S. Steel Group v. United States*, slip op. 01–110, at 12–14, 2001 WL 1012761, at *4–6 (Ct. Int’l Trade Aug. 31, 2001) (affording *Chevron* deference to Commerce’s interpretation of the suspension agreement statute, while “mak[ing] clear that * * * [in antidumping cases] less deference may be owed by the Court of International Trade to agency interpretations in other contexts”).

⁴ To be sure, the Court in *Mead* did not restrict *Chevron* deference by classification of the administrative action, but it did suggest that the overwhelming majority of statutory interpretations deserving *Chevron* deference would be expressed through rulemaking or formal adjudication. 533 U.S. at _____, 121 S. Ct. at 2172–73.

⁵ It is perhaps regrettable that Commerce has seen fit to codify almost none of its verification practices. While that is its right, see *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947), the Court wonders whether the loss of flexibility would not be outweighed by the gain in predictability, particularly with regard to the procedural aspects of verification. *Cf. Nippon Steel Corp. v. United States*, 25 CIT _____, _____, 146 F. Supp. 2d 835, 842 (2001) (observing that Commerce’s resistance to adopting definitive rules for the application of AFA increases the risk that its decisions will appear arbitrary).

⁶ Instead, *Skidmore* deference would apply. See *Mead*, 533 U.S. at _____, 121 S. Ct. at 2171–72. “Th[is] approach has produced a spectrum of judicial responses, from great respect at one end to near indifference at the other.” *Id.* at _____, 121 S. Ct. at 2172 (citations omitted).



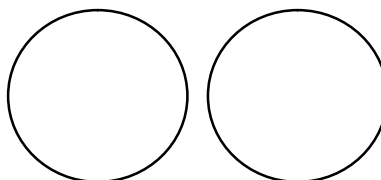
The Court hesitates to reach this conclusion, however, for several reasons. First, the Federal Circuit did not fully explicate its reasoning, so the extent to which its holding depends on *Chevron* is unclear. Second, even if its holding does rest entirely on *Chevron*, *Christensen* and *Mead* are not directly on point, and a trial court may not disregard the controlling precedent of its appellate court where an intervening Supreme Court decision merely casts doubt on the continuing viability of that precedent, rather than directly overruling it. Finally, there is another basis to support the Federal Circuit's determination that Commerce's verification methodology is reviewed for abuse of discretion: the residual standard of review applicable to the proceedings as a whole.

Under that standard, Courts must uphold "any determination, finding, or conclusion" that Commerce makes in an administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. §§ 1516a(b)(1)(B)(i), 1516a(a)(2)(B)(iii). On at least one occasion prior to the Federal Circuit's decision in *Micron Tech.*, the CIT looked to this standard in determining that Commerce's choice of verification methodology should be reviewed for substantial evidence. See *Hercules, Inc. v. United States*, 11 CIT 710, 726, 673 F. Supp. 454, 469 (1987) ("The decision to select a particular [verification] methodology rests solely within Commerce's sound discretion. As long as there is 'substantial evidence on the record' to support the choice, the Court will sustain the methodology chosen by Commerce.").

Yet testing Commerce's choice of verification methodology for substantial evidence appears problematic on its face. Taking as an example one issue from the case at bar, see *infra* Part I.A.1.a, what does it mean to say that Commerce's decision to release the verification outline when it did must be supported by substantial evidence? Substantial evidence of what? Particularly with regard to the more procedural aspects of the verification methodology, the substantial evidence test seems awkward and inapt.

Perhaps for this reason, the CIT more commonly emphasizes the second half of the standard of review when examining an agency's methodology, by asking whether it is "in accordance with law." In *Coalition for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 23 CIT ___, 44 F. Supp. 2d 229 (1999) ("*Coalition*"), the court observed:

Commerce need not prove that its methodology was the only way or even the best way * * * as long as it was a reasonable way. When an agency's method is challenged, [t]he proper role of this court is to determine whether the methodology used by the agency is in accordance with law, and as long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology.



23 CIT at ____, 44 F. Supp. 2d at 258 (citations, internal quotation marks, brackets, and original ellipses omitted). In other words, the agency's methodology must be reasonable, it must be in accordance with law, and it must effectuate the statutory purpose. But how does a court reconcile these precepts with *Micron Tech.*'s directive to review Commerce's verification methodology for abuse of discretion?

In fact, abuse of discretion is not a substantively different standard of review. Rather, "abuse of discretion" and "in accordance with law" are merely different phrasings of the same concept. See Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (requiring the reviewing court to overturn agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law") (emphasis added).

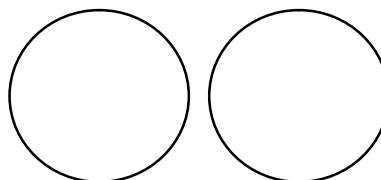
Neither, at least in most cases, are these standards any different than substantial evidence review, historical conceptions to the contrary notwithstanding.⁷ Instead, substantial evidence and arbitrary and capricious "connote[] the same substantive standard of review." *Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 663 n.3 (D.C. Cir. 1996). Substantial evidence "is no more than a recitation of the application of the 'arbitrary and capricious' standard to factual findings." *Maryland People's Counsel v. FERC*, 761 F.2d 768, 774 (D.C. Cir. 1985) (Scalia, J.); see also *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999) ("A reviewing court reviews an agency's reasoning to determine whether it is 'arbitrary' or 'capricious,' or, if bound up with a record-based factual conclusion, to determine whether it is supported by 'substantial evidence.'").

In contrast to substantial evidence review, arbitrary and capricious is not tethered to review of agency factfinding, but rather can serve as a catch-all standard when substantial evidence is inapplicable. See *In re Gartside*, 203 F.3d at 1312–13 (citations omitted). "[T]he arbitrary and capricious standard focuses on the rationality of an agency's decision-making process rather than on the rationality of the actual decision." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994). Thus, it "more naturally fits a determination of a mixed question of factfinding and policy implementation." *Bangor Hydro-Electric*, 78 F.3d at 663 n.3.⁸

Therefore, so long as Commerce's verification methodology may be fairly characterized as a means to implement policy, the abuse of discretion standard applies—but as another guise of the statutorily-mandated substantial-evidence/in-accordance-with-law test, *not* as a discrete or

⁷ Traditionally, de novo review and abuse of discretion review have been conceived as lying at opposite ends of a continuum of deference, with substantial evidence review falling well on the side of greater deference, yet still distinctly less deferential than abuse of discretion. See, e.g., *In re Gartside*, 203 F.3d 1305, 1312 (Fed. Cir. 2000) (observing that substantial evidence "is considered to be a less deferential review standard than 'arbitrary, capricious'" (citing *American Paper Inst., Inc. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 412–13 n.7 (1983); *Abbott Labs. v. Gardner*, 387 U.S. 136, 143 (1967))). However, then-Judge Scalia was among the first to note that an agency action can pass muster under substantial-evidence review but still fail under the supposedly more lenient abuse of discretion standard. See, e.g., *Association of Data Processing Serv. Orgs., Inc. v. Board of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J.) ("[A]n agency action which is supported by the required substantial evidence may in another regard be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'—for example, because it is an abrupt and unexplained departure from agency precedent.").

⁸ By contrast, then-Judge Scalia noted that "the substantial evidence test applies almost exclusively to formal adjudication * * * which is * * * characteristically long on facts and short on policy—so that the inadequacy of factual support is typically the central issue in the judicial appeal." *Association of Data Processing Serv. Orgs.*, 745 F.3d at 685 n.6.



more stringent standard. Alternatively, if Commerce's choice of verification methodology is conceived as an exercise in statutory interpretation,⁹ then *Skidmore* deference is all it merits.

For the reasons given above, the Court cannot overrule its appellate court. Even if it were in a position to do so, however, the substantive result would likely be no different. Accordingly, the Court reviews Commerce's ad hoc verification methodology for abuse of discretion.

DISCUSSION

FMEC and SMC move for judgment on the agency record pursuant to U.S.C.I.T. R. 56.2. They challenge Commerce's determination that they failed verification, Commerce's decision to apply the PRC-wide rates rather than separate rates, and Commerce's decision to apply adverse facts available. The Court considers each of these arguments in turn.

I. Substantial Evidence Supports Commerce's Determination That SMC Failed Verification, But Its Findings Concerning FMEC and the Factories Are Not in Accordance with Law.

A. Verification of FMEC

FMEC alleges two essential reasons why Commerce erred in determining that it failed verification: (1) Commerce conducted the verification in a manner prejudicial to FMEC by not allowing sufficient time either for pre-verification preparation or for the verification itself; and (2) FMEC provided substantially all the information Commerce requested, and the information it did not provide was immaterial.

1. Timing issues related to verification

a. Release of the verification outline

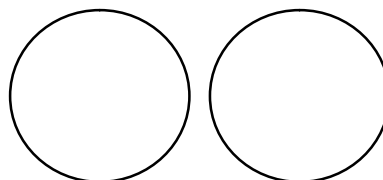
FMEC's first claim regarding the timing of verification concerns the date Commerce released the verification outline. Commerce did so the afternoon of Thursday, September 24, 1998, whereupon the outline was faxed to FMEC's counsel, who was already in China. Thursday, October 1, and Friday, October 2, were both national holidays in China, during which time FMEC was closed for business. FMEC's verification began on Monday, October 5. Thus, FMEC had only four business days to consult the outline in preparation for verification.

FMEC argues that Commerce abused its discretion by issuing the verification outline only four business days prior to the start of verification. See Pls.' Memo, at 22–26. FMEC suggests that the resolution of this issue should be controlled by the Court's prior opinion in *Rubberflex Sdn. Bhd. v. United States*, 23 CIT ___, 59 F. Supp. 2d 1338 (1999). In *Rubberflex*, the Court held that Commerce abused its discretion by issuing a

⁹The Court doubts whether this is so. In an analogous case, in which the D.C. Circuit reviewed an agency's methodology for determining what actions satisfied a statutory requirement of "substantial compliance," the court observed: *Chevron* is principally concerned with whether an agency has authority to act under a statute.

* * * * *

In the present case, however, there is no question that the [agency] had authority to define the circumstances constituting * * * substantial compliance. * * * The only issue here is whether the [agency's] discharge of that authority was reasonable. Such a question falls within the province of traditional arbitrary and capricious review. *Arent v. Shalala*, 70 F.3d 610, 616–17 (D.C. Cir. 1995)



verification outline only two days prior to the start of verification. *Id.* at 1349.

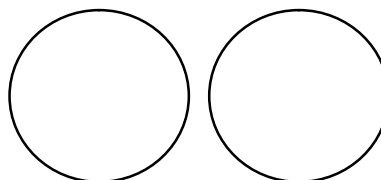
Commerce distinguishes *Rubberflex* on the grounds that FMEC had twice as much time for preparation as did the *Rubberflex* plaintiff. See Commerce's Memo, at 32–33. Commerce further argues that it followed its standard practice of issuing an outline not fewer than seven days prior to the verification, and that FMEC cannot prove that Commerce officials deliberately ignored the Chinese holidays. See *id.* Finally, Commerce notes that FMEC knew of and agreed to the verification date in advance, and suggests that by such acceptance FMEC forfeited its right to complain about the scheduling of the verification. See *id.*

Although relevant, none of the considerations cited by Commerce is dispositive.¹⁰ While four-day notice of the verification outline may be insufficient in some cases, the Court declines to adopt a per se rule. Instead, the Court applies the essential test of *Rubberflex*, which asks whether the verification outline was issued so tardily as to “preclude [FMEC] from having a meaningful opportunity to participate in the review process.” *Rubberflex*, 23 CIT at ___, 59 F. Supp. 2d at 1345.

In *Rubberflex*, the plaintiff produced record evidence demonstrating that the late issuance of the verification outline directly impacted its ability meaningfully to participate in the verification. In that case, as in this one, the verification outline instructed the subject of verification to present corrections to questionnaire responses at the start of verification. See 23 CIT at ___, 59 F. Supp. 2d at 1346; Pls.' App. 5, Antidumping Duty Admin. Review of HFHTs from the PRC Verification Agenda for FMEC (“FMEC Verification Outline”), at 1, 3. The *Rubberflex* plaintiff was unable to complete its corrections prior to the start of verification, Commerce subsequently refused to accept its corrected worksheets. See 23 CIT at ___, 59 F. Supp. 2d at 1347. In the instant case, by contrast, FMEC evidently had no trouble successfully completing its corrections prior to verification. See Pls.' App. 16, Fujian Mach. & Equip. Imp. and Exp. Corp.: Report on the Verification of Sales Info. Submitted in the Admin. Review Covering February 1, 1997 through January 31, 1998 (“FMEC Verification Report”), at 2.

Of course, as this Court noted in *Rubberflex*, an outline facilitates the verification subject's preparations in other ways, by narrowing the scope of verification and identifying specific transactions on which the verifiers intend to focus. See 23 CIT at ___, 59 F. Supp. 2d at 1347–48. However, FMEC has not made any showing that its preparations were

¹⁰ While the Court cannot agree that FMEC's assent to the verification date negates its right to protest the outline release date, the Court does note that in *Rubberflex* Commerce denied the exporter's request to delay verification to allow further time for preparation. See *Rubberflex*, 59 F. Supp. 2d at 1343. By contrast, FMEC concurred in the scheduling of verification and, upon the delayed issuance of the verification outline, never indicated any concern to Commerce or suggested that it would be unable to complete its preparations. Moreover, the Court is unwilling to charge Commerce with sole responsibility for keeping track of foreign holidays. If an exporter foresees a problem with the scheduling of verification, either initially or after Commerce delays issuing a verification outline, it should inform Commerce immediately rather than wait to make post hoc objections after a failed verification. See, e.g., *Notice of Postponement of Final Antidumping Duty Determination: Disposable Pocket Lighters from the PRC*, 60 Fed. Reg. 5,899, 5,900 (January 31, 1995) (exporters requested postponement in part due to “scheduling conflicts resulting from [their] observance of Chinese New Year”).



actually materially prejudiced by the delayed issuance of the outline, or that Commerce's stated reasons for finding a failure of verification follow in any way from the delay. In order for the Court to take the "extraordinary step of ordering the parties to repeat verification," *Rubberflex*, 23 CIT at ___, 59 F. Supp. 2d at 1349, FMEC must do more than complain that it did not have enough time; it must provide some record evidence to show that verification would have proceeded differently if Commerce had afforded it more time to prepare.

For example, the FMEC Verification Report and the *Final Results* both cite FMEC's failure to provide quantity and value worksheets as one of several factors supporting Commerce's determination that U.S. sales were unverifiable. A credible allegation that FMEC lacked sufficient time to prepare such worksheets would constitute prima facie evidence that it was prejudiced by the delayed issuance of the outline. By its own admission, however, FMEC failed to provide quantity and value worksheets for either of two reasons that were completely unrelated to the late issuance of the verification outline.¹¹

Likewise, none of the other problems that Commerce identified at FMEC's verification are causally connected to the late issuance of the outline.¹² Accordingly, because FMEC has not shown any prejudice, the Court finds that Commerce did not abuse its discretion by issuing the verification outline when it did.¹³

b. Time allotted for verification

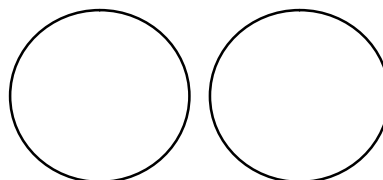
FMEC's second objection related to the timing of verification concerns the actual duration of the verification. Specifically, FMEC argues that Commerce allowed insufficient time to conduct the verification, inflexibly adhered to a predetermined two-day schedule, and unfairly penalized FMEC for verification tasks that went uncompleted. See Pls.' Memo, at 26–27. FMEC claims that Commerce has previously allowed more than two days for verifications in the PRC, both in an earlier administrative review of the antidumping duty order at issue here,¹⁴ and in reviews of other orders. See, e.g. *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the PRC; Final Results of Antidumping Duty Admin. Reviews*, 61 Fed. Reg. 65,527, 65,542 (Dec. 13,

¹¹ Before this Court, FMEC argues that it did not provide quantity and value worksheets because the verifiers neglected to request them until late on the second day of verification, after the accountant who had access to them had left for the day. See Pls.' Memo at 8, 28–29. FMEC had previously argued this same point to Commerce. See Pls.' App. 7, *Heavy Forged Hand Tools From China—Revised Case Brief Filed on Behalf Of FMEC, Shandong Huarong, TMC, and SMC* ("Pls.' Case Brief"), at 24–25. At the same time, however, and in an apparent self-contradiction, FMEC also stated that it was unable to prepare quantity and value worksheets because it lacked the requisite flexible accounting system. See *id.* at 23.

¹² FMEC does argue in passing that "[s]ome of the problems encountered during the verification might have been avoided if FMEC had more time to prepare. * * *" See Pls.' Memo, at 25. However, FMEC never identifies which problems might thus have been avoided, or, more importantly, ties such problems to the specific deficiencies cited by Commerce in the *Final Results*.

¹³ The Court observes once again that Commerce's statutory mandate is to determine dumping margins as accurately as possible. See *Rhone Poulenc, Inc. v. United States*, 8 Fed. Cir. (T) 61, 67, 899 F.2d 1185, 1191 (1990). To the fullest extent possible, verification should be a cooperative process. The Court trusts that its decision on this issue will not promote future gamesmanship by either Commerce or exporters.

¹⁴ Although FMEC states that the verification of SMC took three days in a previous review, the case it cites does not discuss the length of any verification. See Pls.' Memo, at 27 (citing *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the PRC; Final Results of Antidumping Duty Admin. Reviews*, 60 Fed. Reg. 49,251 (Sept. 22, 1995)).



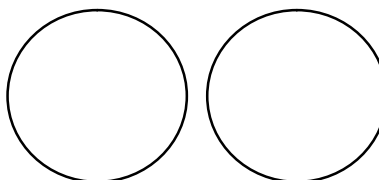
1996) (three-day verification). FMEC largely blames its verification failure on the verification officials, who it claims were unfamiliar with the case and wasted precious time asking general questions. *See* Pls.' Memo, at 28.

FMEC also claims that the verifiers could have obtained much of the information that the *Final Results* identified as not provided. In particular, FMEC alleges that the verifiers waited until after business hours on the second and final day of verification to ask to see FMEC's voucher books and quantity and value worksheets. *See* Pls.' Memo, at 28. By that time, FMEC's American counsel had, with the verifiers' assent, already proceeded to SMC to prepare for SMC's verification, and the FMEC employees with access to the relevant information had gone home for the day. *Id.* at 28–29; FMEC's Add'l Submissions Letter, at 2, 4. FMEC alleges that when its officials finally reached one of the errant employees three and a half hours later, at 9:00 p.m., the verifiers said it was "too late" and that it was "not necessary" for the employee to return to FMEC's offices to supply the requested information. *See* Pls.' Memo, at 28–29; Pls.' Case Brief, at 24–25; FMEC's Add'l Submissions Letter, at 6. FMEC further claims that when the verifiers caught up with its counsel at SMC's offices, they never indicated otherwise when he repeatedly asked them whether FMEC had supplied all requested information. *See* FMEC's Add'l Submissions Letter, at 6. Eleven days after publication of the AFA Memo, and four days after the publication of the Preliminary Results, FMEC's counsel wrote to Commerce alleging these facts and requesting an opportunity to submit documents unavailable during verification. *See* FMEC's Add'l Submissions Letter. Commerce denied the request as untimely. *See* Commerce's Add'l Submissions Letter, at 1.

In its briefs before this Court, Commerce conversely blames FMEC for being unprepared and suggests that if it "had taken a few simple steps" to make its records more accessible, all tasks could easily have been completed in the allotted two days. *See* Def. Memo. in Opp. to Pls.' Mot. for J. upon the Agency R. ("Commerce's Memo"), at 33. Commerce does not specifically address FMEC's claim that it unfairly penalized FMEC for the temporary unavailability of documents at verification. However, in the *Final Results*, Commerce averred that "[a]t no time during the verification did [FMEC] officials request additional time to provide the information." 64 Fed. Reg. at 43,663.

Based on the record before it, the Court is in no position to resolve which participants in the verification were comparatively less disorganized. Regardless, FMEC's citations to cases in which verifications lasted longer than two days do not demonstrate the sort of consistent practice a deviation wherefrom Commerce would be obliged to explain.¹⁵ This Court has previously acknowledged Commerce's discretion in setting the length of verifications, in recognition of the time constraints imposed by statute for the completion of the review as well

¹⁵ Evidence of Commerce's practice in reviews of antidumping duty orders of different subject merchandise, in different countries, is of particularly dubious relevance.



as limits on the agency's resources. *See Persico Pizzamiglio, S.A. v. United States*, 18 CIT 299, 307 (1994); *see also Micron Tech.*, 15 Fed. Cir. (T) at ___, 117 F.3d at 1396 (affording Commerce "the latitude to derive verification procedures ad hoc"). Inasmuch as the parties concur that two days would have sufficed had the verification progressed more smoothly, the Court finds that Commerce did not abuse its discretion by allocating two days for FMEC's verification, and conducting it in that time.

However, Commerce's discretion in establishing and maintaining a schedule for verification, while great, is not unbounded. At all times, "Commerce must give respondents a reasonable opportunity to participate in the review and verification process." *Rubberflex*, 23 CIT at ___, 59 F. Supp. 2d at 1346. *See also Böwe-Passat v. United States*, 17 CIT 335, 339 (1993) ("[T]he review process is bilateral and interactive. The party must be afforded a reasonable opportunity * * * to satisfy evidentiary concerns."). Where it becomes apparent in the course of a verification that strict adherence to the verification schedule will impinge a respondent's opportunity to satisfy evidentiary concerns, the verifying officials have two choices.

First, the verifiers may amend or adapt the verification schedule to allow the respondent additional time to meet their evidentiary requests. Commerce's discretion in establishing and maintaining a verification schedule necessarily subsumes the ability to modify that schedule as the need arises.

Alternatively, if the exigencies of the verification schedule do not allow the verifiers to adapt it sufficiently to permit the full participation of the respondent, the verifiers must allow the respondent to submit requested documentary evidence shortly after the end of verification, pursuant to Commerce's own regulations.¹⁶ Specifically, 19 C.F.R. § 351.301 provides:

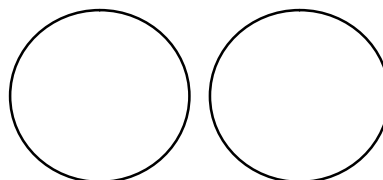
(b) *Time limits in general.* Except as provided in paragraphs (c) and (d) of this section and § 351.302, a submission of factual information is due no later than:

* * * * *

(2) For the final results of an administrative review, 140 days after the last day of the anniversary month, except that *factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed.*

19 C.F.R. § 351.301(b)(2) (1998) (emphasis added). "Factual information," in turn, is defined in the regulations as: "(1) Initial and supplemental questionnaire responses; (2) Data or statements of fact in support of allegations; (3) Other data or statements of facts; and (4) Documentary evidence." 19 C.F.R. § 351.102(b) (1998).

¹⁶ It is axiomatic that "Commerce, like other agencies, must follow its own regulations." *Torrington Co. v. United States*, 14 Fed. Cir. (T) ___, ___, 82 F.3d 1039, 1049 (1996) (citing *Fort Stewart Schools v. Federal Labor Relations Auth.*, 495 U.S. 641, 654 (1990)).



The regulations are plainly written, and their meaning is clear: when verifying officials request information from a respondent, including data and documentary evidence in support of the respondent's questionnaire responses,¹⁷ the respondent is not legally obligated to satisfy the request until a minimum¹⁸ of one week after the conclusion of that respondent's verification.¹⁹

In the instant case, the record suggests that FMEC was motivated to cooperate with the verifiers' evidentiary requests, but was unable to resolve complications that arose during the final hours of the verification, when its American counsel had departed and many of its employees had left work for the day. Under these circumstances, a request to submit temporarily inaccessible documents pursuant to 19 C.F.R. § 351.301(b)(2) would have been entirely reasonable. However, FMEC made no such request until after the release of the AFA Memo, *see* FMEC's Add'l Submissions Letter, long after the seven-day window provided by § 351.301(b)(2) had closed. In the *Final Results*, Commerce suggested that FMEC was responsible for this omission. *See* 64 Fed. Reg. at 43,663. FMEC conversely blames the verifiers for failing to inform it that its document production was inadequate, citing 19 U.S.C. § 1677m(d) (1994).²⁰

The Court declines to consider whether the statute imposes such an affirmative duty on Commerce in the context of verification, because FMEC did not press the issue in its briefs before the Court.²¹ In this case, Commerce did not merely neglect to inform FMEC that certain responses were unsatisfactory; it implicitly represented to FMEC that the responses were satisfactory, on at least two occasions. First, the verifiers told FMEC officials that it was "not necessary" to recall the employee with access to the quantity and value worksheets. Inasmuch as the verifiers had already modified numerous information requests to take account of FMEC's rudimentary record-keeping, FMEC officials could reasonably have interpreted this comment as an indication that the verifiers did not consider the matter worth pursuing.

More importantly, when the verifying officials met up with FMEC's counsel at SMC's headquarters, they apparently remained silent in the face of his repeated inquiries as to whether FMEC had supplied all nec-

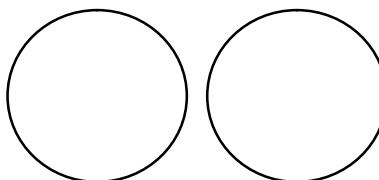
¹⁷ Of course, the questionnaire responses themselves are typically due well before verification, according to Commerce's specification. *See* 19 C.F.R. § 351.301(c).

¹⁸ *See Antidumping Duties; Countervailing Duties* 62 Fed. Reg. 27,296, 27,332 (May 19, 1997) (amending 19 C.F.R. §§ 351, 353, 355) (explaining that the word "normally" was added to a draft version of section 351.301(b)(2) "to clarify that the deadline can be extended where appropriate").

¹⁹ In practice, a respondent should be fully prepared for verification and try to satisfy all requests for factual information immediately, not only because much evidentiary documentation feasibly can only be inspected on-site, but also to reduce the risk that the verifying officials will find the information to be deficient. Otherwise, the respondent would have no time left to correct the deficiency, and Commerce would be entitled to use facts otherwise available in lieu of the respondent's information. *See* 19 U.S.C. §§ 1677m(d), 1677e(a)(2) (1994). The Court expresses no opinion as to whether this purely hypothetical scenario would support the use of adverse facts available under 19 U.S.C. § 1677e(b).

²⁰ Section 1677m(d) requires Commerce to give prompt notice of deficiencies in a response to an information request and to permit remedial action if practicable.

²¹ Although FMEC cites the statute once, in its "Summary of Argument" section, *see* Pls.' Memo at 4, nowhere else in its briefs does it develop this argument.



essary information.²² Under the circumstances, FMEC's counsel could reasonably interpret their silence as an indication that FMEC had satisfied the verifiers' information requests.²³ The alacrity with which FMEC subsequently offered to provide the relevant documents, upon learning from the AFA Memo that Commerce considered them important, strongly suggests that FMEC would have submitted them immediately after verification had the verifying officials not implied that to do so was unnecessary.

The verifying officials should have known that their comments and actions would dissuade FMEC from timely submitting data that could facilitate the calculation of an accurate dumping margin.²⁴ Therefore, Commerce abused its discretion by subsequently refusing to accept the proffered documentation. *Cf. Ta Chen Stainless Steel Pipe v. United States*, slip op. 99-117, 1999 WL 1001194, at *12-14 (Ct. Int'l Trade Oct. 28, 1999) (holding that a party's noncompliance with the deadlines established by the prior version of 19 C.F.R. § 351.301(b)(2) was excused by its reliance on Commerce's representations). Accordingly, the Court finds that Commerce must now afford FMEC the opportunity to submit those documents that it would have provided at the verification or immediately afterwards.

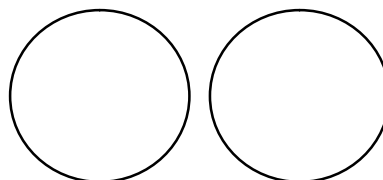
The Court limits its order to the information that FMEC would have provided at verification or in the seven days thereafter, but for the misunderstandings described above.²⁵ Needless to say, FMEC may not take this opportunity to craft new documentation to satisfy Commerce's information requests, as the CIT has repeatedly upheld Commerce's policy of rejecting verification data that was not generated "in the ordinary course of business." *See, e.g., Heveafil Sdn. Bhd. v. United States*, slip op. 01-22, at 8, 2001 WL 194986, at *3 (Ct. Int'l Trade Feb. 27, 2001) (citations and quotations omitted); *see also Gourmet Equip. (Taiwan) Corp. v. United States*, slip op. 00-78, at 10, 2000 WL 977369, at *3 (Ct. Int'l Trade July 6, 2000) (upholding Commerce's rejection of an audit prepared solely for the antidumping review). Thus, for example, FMEC may submit quantity and value worksheets only if it demonstrates that it was prepared to do so at the time of verification.

²² Neither in Commerce's Add'l Submissions Letter, nor in the *Final Results*, nor in its briefs before this Court does Commerce ever contest FMEC's version of these events. Thus, the Court assumes them to be substantially true.

²³ For the same reason, the Court's determination on this issue is not altered by the brief remark in the *Final Results* that "[r]espondents maintained a list of data requests by [the verifiers] and understood what had been supplied and what was still pending." 64 Fed. Reg. at 43,664. In the context of a verification in which the verifiers modified numerous requests, it would be unfair to expect FMEC's counsel to give more credence to this list than to the verifiers' representations. Moreover, Commerce does not discuss this list in its brief before this Court.

²⁴ In a previous case, the CIT declined to draw any inferences from the conduct of verifiers who left a verification early without informing the respondent that corrections to a database were unsatisfactory. *See Acciai Speciali Terni S.P.A. v. United States*, 25 CIT ___, ___, 142 F. Supp. 2d 969, 986-87 (2001). In that case, however, the respondent sought to require Commerce to use already-submitted data pursuant to 19 U.S.C. § 1677m(e) (1994); the instant case concerns Commerce's obligation to allow respondents to submit data pursuant to 19 C.F.R. § 351.301(b)(2).

²⁵ In addition to the voucher books and quantity and value worksheets discussed above, there is record evidence tending to show that that FMEC did not provide the verifiers with other factual information, including documentation on short- and long-term investments, and financial records for two [], because of the same time constraints. *See Pls.' Case Brief* at 24, 26-27. Although FMEC does not specifically discuss these data in its briefs before this Court, the Court considers them to be subsumed within the category of "documents" that FMEC later petitioned Commerce to accept. *See FMEC's Add'l Submissions Letter*.



2. FMEC's remaining arguments about verification

The last-minute problems with accessibility of documents do not explain all of the problems that Commerce found during and after verification. Two other key problems identified by Commerce were: 1) FMEC's failure to provide a complete list of sales; and 2) FMEC's total failure to report any sales of bars/wedges, an omission that Commerce learned about only after it had issued the *Preliminary Results*.

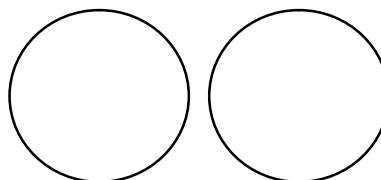
During the verification, the verifying officials requested a complete list of all products sold during the period of review, which FMEC was unable to provide. Instead, FMEC officials offered a complete catalogue of FMEC's products, explaining that it did not have an "integrated computer system."²⁶ *Final Results*, 64 Fed. Reg. at 43,662; Pls.' Case Brief, at 22-23. FMEC now argues that Commerce may not penalize it for its apparent lack of an advanced computing system, because the antidumping laws require Commerce to "take into account any difficulties experienced by interested parties, particularly small companies, in supplying information," Pls.' Memo, at 21 (quoting 19 U.S.C. § 1677m(c)(2)), and to consider an exporter's individual circumstances, "including (but not limited to) the party's size, its accounting systems, and computer capabilities." *Id.* at 21 (quoting SAA at 865). Thus, FMEC argues, Commerce should have used its imperfect data pursuant to 19 U.S.C. § 1677m(e), which requires Commerce to accept information submitted by an interested party even if it does not meet all of Commerce's requirements, provided that

- (1) the information is submitted by the deadline established for its submission,
- (2) the information can be verified,
- (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
- (4) the party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] with respect to the information, and
- (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e) (1994).

FMEC's arguments are unconvincing. The Court doubts whether FMEC, with total sales in 1997 of over [], qualifies as a small company. See Pls.' Case Brief, at 21. More importantly, there is ample evidence that the verifiers *did* adjust many of their information requests to take account of FMEC's peculiar difficulties. See, e.g., FMEC Verification Report, at 7. The law requires no more than this. As the SAA explains, Commerce is supposed to "explore alternative methods to obtain the necessary data," SAA at 865, not waive the need to obtain the data altogether. The law is only "intended to alleviate some of the difficulties encountered by small firms and firms in developing countries * * *. It is

²⁶ Although the record is contradictory, see *supra* at n.11, apparently the lack of such a system made it impossible for FMEC to create quantity and value worksheets. See Pls.' Case Brief, at 23. This point needs to be clarified on remand. If true, the analysis here would also apply to the failure to provide such worksheets.



not intended to exempt [such] firms from the requirements of the anti-dumping and countervailing duty laws.” *Id.* Because Commerce’s mission is to calculate accurate dumping margins, *see Rhone Poulenc*, 8 Fed. Cir. (T) at 67, 899 F.2d at 1191, nothing in the law requires it to accept incomplete data simply because an exporter has a deficient computing system.²⁷ Section 1677m(e) is of no avail to FMEC, because FMEC has not demonstrated that a mere catalogue is sufficiently complete as to provide a reliable basis for Commerce’s determination, or that it can be used without undue difficulties, as required by § 1677m(e). *See Fabrique de Fer de Charleroi, S.A. v. United States*, 25 CIT ___, ___, 155 F. Supp. 2d 801, 808 (2001) (holding that Commerce had discretion to use facts available after determining that alternative forms in which exporter submitted information were too incomplete to be reliable and could not be used without undue difficulties).

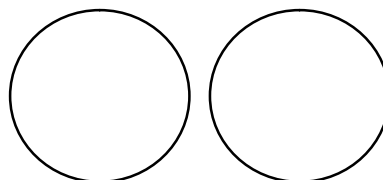
Moreover, the SAA also directs Commerce to consider the “prior success of the same firm” in providing the requested information in previous reviews. SAA at 865. There is no record evidence to show that this was a new or unusual information request. Accordingly, Commerce is entitled to disregard FMEC’s sales catalogues.²⁸

FMEC also failed to report any sales of bars/wedges, although it made [] such sales during the period of review. This omission was caught not during verification, however, but later, after the Customs Service responded to an inquiry by Commerce. FMEC explained to Commerce that it had inadvertently failed to report the shipments because it lacked a computerized record-keeping system, and its officials did not recognize the product name or code number while preparing their questionnaire responses. *See Pls.’ Unreported Sales Letter*, at 4–5. For this reason, and because the sales of bars/wedges constitute a relatively small portion of FMEC’s total sales of subject merchandise during the period of review,²⁹ FMEC argues that Commerce acted contrary to law by citing these unreported sales as a basis for applying adverse facts available. *See Pls.’ Memo*, at 13–17. FMEC also argues that because Commerce calculated separate dumping margins for each of the four classes of subject merchandise, its failure to report sales of bars/wedges should not affect Commerce’s treatment of its sales of the other three types of merchandise. FMEC does not, however, seriously argue that Commerce may not use facts available to calculate a rate for bars/wedges. That Commerce may do so necessarily follows from the foregoing analysis regarding FMEC’s sales catalogue.

²⁷ Evidence of FMEC’s information technology shortcomings is undeniably relevant to the question of whether it cooperated to the best of its ability for the purpose of adverse facts available. *See infra*, Part III.

²⁸ Whether FMEC’s failure to provide a complete list of sales is an isolated issue that may be remedied through application of partial facts available, or whether such errors instead corrupt the entire sales data and thus necessitates the use of total facts available, is an issue that Commerce must address on remand.

²⁹ The unreported bars/wedges constitute [] percent of the value of all subject merchandise imported during the period of review. *See Pls.’ Memo*, at 15. The Court notes, however, that treating each class of subject merchandise separately, as FMEC also urges, contradicts the logic its argument on this issue. Expressed in those terms, FMEC failed to report 100 percent of its bars/wedges.



It is not obvious to the Court how, where different types of subject merchandise receive different dumping margins, a flaw in the data that affects only one type of merchandise has any bearing on the data for the other types of merchandise. Commerce has not explained its reasoning. Accordingly, the Court finds that Commerce's determination that FMEC failed verification with respect to bars/wedges is supported by substantial evidence, but remands so that Commerce may explain how and why this failure affected its treatment of the other types of subject merchandise.

B. Verification at SMC

SMC contests Commerce's finding that it failed verification on the grounds that (1) like FMEC, it was hampered by the two-day time limit for verification³⁰; and (2) it provided substantially all the information Commerce requested, and any information not provided was immaterial. *See* Pls.' Memo, at 29–32.

Commerce argues, as it did with respect to FMEC, that two days was sufficient for verification and that SMC's lack of preparation caused its verification failures. Commerce's Memo, at 33. Commerce also identifies a number of shortcomings in SMC's responses to its information requests. The most serious problems included the verifiers' lack of access to certain records; SMC's failure to provide information on its ownership interest in its U.S. affiliate, Pacific Tools; and the verifiers' inability to trace all sales due to SMC's rudimentary bookkeeping. *Id.* at 35–36; *Final Results*, 64 Fed. Reg. at 43,665. In addition, not only did the verifiers discover one unreported sale of mattocks at verification, but the subsequent review by the Customs Service disclosed that SMC had failed to report at least one shipment of bars.³¹

The Court finds that SMC's claim that it was prejudiced by the conduct of verification is unfounded, and that Commerce has adduced substantial evidence supporting its finding that SMC failed verification.

1. Effect of the two-day limit for verification

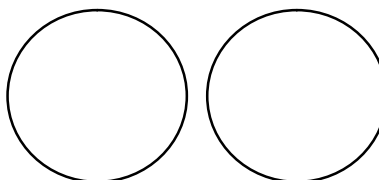
Unlike FMEC, SMC has failed to prove that Commerce's manner of conducting verification thwarted its opportunity for meaningful participation, or was otherwise so prejudicial as to amount to an abuse of discretion. Although SMC characterizes its verification as plagued by "confusion and misunderstanding," *see* Pls.' Memo, at 29, it has previously acknowledged that the verification was comparatively well-or-

³⁰ SMC does not argue that the delayed release of the verification outlines impinged its participation, presumably because its verification began three days after FMEC's.

³¹ The record is hopelessly confusing on this point. Based on the information supplied by the Customs Service, Commerce identified five unreported shipments of alleged subject merchandise that it attributed to SMC, listed in Pls.' Unreported Sales Letter and Commerce's Unreported Sales Letter as items 12 through 16.

Commerce now states that SMC did not ship the merchandise listed in item 12 or item 15, even though SMC previously acknowledged shipping item 12 and blamed the omission on its rudimentary record-keeping system. *See* Commerce's Memo, at 20 n.6; *see* Pls.' Unreported Sales Letter, at 5–7. With respect to SMC's claim that the merchandise in items 13, 14, and 15 was not subject merchandise, Commerce stated that SMC failed to request a scope ruling and could not initiate such an inquiry itself. Commerce's Unreported Sales Letter, at 2–3. However, Commerce does not address SMC's claim that it did not ship the merchandise listed in items 13 or 14. *See* Pls.' Unreported Sales Letter, at 5–7.

The record lacks sufficient information for the Court to solve this puzzle. SMC has failed to press this point in its arguments before the Court, and in any event, has acknowledged responsibility for at least *some* unreported sales.



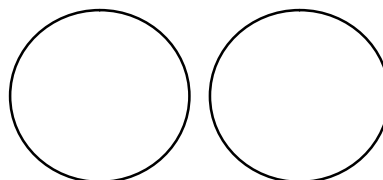
ganized, as the verifiers adapted their methodology in light of their experience at FMEC. *See* Pls.' Case Brief, at 30–32, 33. The verifiers began SMC's verification by discussing what information packages SMC should prepare, in recognition of the limits of SMC's accounting system; they listed each verification task in English and Chinese on a blackboard, and erased it upon its completion; they had all verification records brought into a single room for ease of access; and they identified the SMC officials with relevant information whom they expected to be available throughout verification. *See id.* at 30–31.³²

In contradistinction to FMEC, SMC points to nothing in the record to suggest that the verifiers lulled SMC into a false belief that it had satisfied all requests for information. There is no evidence that the plaintiffs' American counsel ever asked the verifiers whether SMC had satisfied all information requests. Nor is there any evidence that the verifiers told SMC officials or SMC's counsel that it was "not necessary" to provide any missing information. As a general rule, the mere fact that the verifying officials erased any given task from the blackboard before it was completed to their satisfaction likely reflected a common recognition that SMC lacked the ability to provide the requested information. As Commerce explained to SMC prior to verification, under such circumstances its verifying officials were obliged to move on to the next task. *See* Pls.' App. 6, Antidumping Duty Admin. Review of HFHTs from the PRC Verification Agenda for SMC ("SMC Verification Outline"), accompanying letter at 2.

There is, however, one important disparity between SMC's account of verification and Commerce's version of events. SMC claims that Commerce continues to labor under a mistaken belief that SMC did not afford the verifiers access to the invoices and sales documentation of its Agriculture Department and No. 2 Hardware & Tools Department, which were responsible for sales of subject merchandise. *See* Pls.' Memo, at 31. According to SMC, the complete records were in the verification room throughout the entire verification. Lacking the vantage of a fly on the wall of that room, the Court cannot say which party is correct on this score. Yet even if the Court were to give SMC the benefit of the doubt, SMC's failure to take any remedial steps upon learning of Commerce's alleged misapprehension negates any inference that the verifiers hindered SMC's exercise of a legal right.

Specifically, there is no indication that SMC ever sought to provide temporarily inaccessible data pursuant to 19 C.F.R. § 351.301(b)(2), either immediately after the verification, or, by comparison with FMEC, after dissemination of the AFA Memo. It is uncontested that SMC was aware of its failure to provide the requested information concerning its

³² According to SMC, at the end of its verification only one task remained on the blackboard: providing the records for Pacific Tools, its U.S. affiliate. *See* Pls.' Case Brief, at 31–32. Thus, there appears to have been enough, or nearly enough, time to complete all the verification tasks, especially since the verifiers significantly moderated their information requests because much of SMC's data had to be compiled by hand rather than by computer. *See* SMC Verification Report, at 8. This fact belies SMC's argument that the verifiers unreasonably sought "to audit the entire operations of [SMC]." Pls.' Case Brief, at 8.



U.S. affiliate, Pacific Tools, yet at no stage of the proceedings did it ever attempt to remedy this omission. Instead, SMC merely argues that it did not need to provide information about Pacific Tools because such information was irrelevant to the proceedings. *See* Pls.' Memo, at 32; Pls.' Case Brief, at 43–44. Thus, it cannot impute its failure to provide sales information to the verifiers.

Likewise, even assuming that the verifiers neglected to apprise SMC of their belief that SMC had not made certain records available, their omission would only be relevant insofar as it excused SMC's obligation to comply with the time limits for the submission of information set forth in 19 C.F.R. § 351.301(b)(2). Because SMC never attempted to submit such information even after it became aware of the deficiency, it cannot show that it was prejudiced by the way Commerce conducted verification.

2. SMC's Non-Compliance With Information Requests

Commerce identified a number of problems with the information SMC submitted, or failed to submit, at verification. First, SMC's failure to provide access to invoices and other sales documents made it impossible for Commerce to perform a completeness test. *See Final Results*, 64 Fed. Reg. at 43,665. Second, SMC's explanation that information regarding its U.S. affiliate was immaterial is patently unacceptable. Commerce need not accept at face value a respondent's "mere statements" about the nature, quality, or relevance of the information it submits. *Cf. Fabrique de Fer*, 25 CIT at ___, 155 F. Supp. 2d at 808. Otherwise, verification would be pointless. Third, insofar as Commerce was unable to trace all sales due to SMC's rudimentary bookkeeping and computational capabilities, it is not required to use SMC's incomplete data, for the same reasons that the Court held that Commerce did not have to accept FMEC's similarly imperfect information.³³ *See supra*, Part I.A.2. Finally, SMC failed to report several sales of subject merchandise. Such omissions constitute substantial evidence supporting the use of facts available, at least with respect to the classes of merchandise that were not fully reported. *See id.*

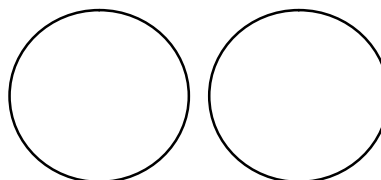
The Court finds that these errors and omissions, taken together, constitute substantial evidence that SMC failed verification.

C. Verification of Factory A and Factory B

After the verifications at FMEC and SMC, Commerce proceeded to conduct verifications at Factory A and Factory B, owned by the plaintiffs' suppliers. Commerce determined that the Factories' reported caps³⁴ were unreliable; that Factory A could not tie its purchases of steel to its consumption of steel; and that Factory B had neglected to report three factor inputs altogether. Consequently, Commerce determined

³³ The Court notes that SMC is [] than FMEC, with annual sales of []. *See* Pls.' Case Brief, at 32. Nevertheless, the verifiers modified many of their information requests to accommodate SMC's limited accounting resources. *See, e.g.*, SMC Verification Report, at 8.

³⁴ Caps are approximations, based on historical production norms, of costs and quantities of inputs for factors of production.



that both Factories failed verification. This failure was imputed to the plaintiffs, as the Factories do not export subject merchandise themselves, but only supply FMEC and SMC.

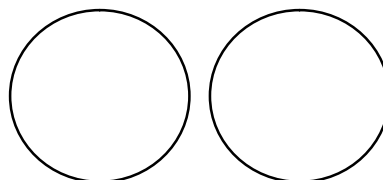
1. Treatment of caps

FMEC and SMC argue that Commerce abused its discretion by refusing to accept the Factories' use of caps in this review. They argue that the Factories have, in the ordinary course of business, always recorded inputs in the form of caps, and that Commerce has accepted this practice in each prior review. *See* Pls.' Memo, at 32. Commerce does not discuss the Factories' verifications in its brief before this Court, except to summarize recite their verification failures in its "Statement of Facts." *See* Commerce's Memo, at 8–11, 14–15. In the *Final Results*, however, Commerce stated that although it did confirm that the reported caps were "reasonable estimates of the weight of certain material inputs," *see* 64 Fed. Reg. at 43,665, it found them unreliable because the Factories could not trace the caps to their accounting records. *See id.* at 43,665–66.

FMEC and SMC protest that this latter requirement was an unreasonable departure from Commerce's practice in prior reviews, when it was content merely to weigh the inputs in order to verify the reasonableness of the Factories' use of caps. *See* Pls.' Memo, at 34–35. They argue that the Factories' rudimentary accounting system does not permit the sort of product-specific tracing³⁵ that the verifiers sought, and that Commerce should have taken these limitations into consideration as required by the SAA. *See id.*; *cf. supra*, Part I.A.2. Accordingly, they claim that Commerce abused its discretion by changing its methodology.

As a rule, Commerce is free to discard one methodology in favor of another, the better to calculate more accurate dumping margins. *See, e.g., NSK Ltd. v. United States*, 19 CIT 1013, 1027, 896 F. Supp. 1263, 1275 (1995) (noting that Commerce need not "adhere to its prior * * * methodology, especially where Commerce is striving for more accuracy"), *aff'd in part and rev'd in part on other grounds*, 15 Fed. Cir. (T) ___, 115 F.3d 965 (1997). There are, however, two restrictions on its liberty to do so. First, Commerce may not make minor but disruptive changes in methodology where a respondent demonstrates its specific reliance on the old methodology used in multiple preceding reviews. *See Shikoku Chemicals Corp. v. United States*, 16 CIT 382, 795 F. Supp. 417 (1992) (overturning Commerce's use of a slightly improved methodology whose effect was, after four successive reviews finding zero or de minimis dumping, to deny revocation of the antidumping duty order, where the exporter demonstrated that it had set its prices in reliance on the old methodology). In the instant case, there is no evidence of the Factories' deliberate reliance on the old methodology; accounting limita-

³⁵ From the record, it appears that the Factories use most inputs, such as labor or paint, to produce a variety of goods, including both subject- and non-subject merchandise. Their accounting records do not record actual consumption on a per-product basis (except that Factory A does record actual consumption of steel). Thus, they rely on estimates based on historical production norms. *See* Pls.' Memo, at 32–35; Pls.' Case Brief, at 44–47. Factory A also suggests that because steel accounts for over [] percent of its total costs of production, its use of caps for the other, relatively minor inputs is particularly reasonable. *See* Pls.' Memo, at 33.



tions rather than any affirmative choice explain the Factories' continued preference for the old methodology. See *Sanyo Elec. Co., Ltd. v. United States*, 23 CIT ___, 86 F. Supp. 2d 1232, 1243 (1999) (upholding Commerce's "disturbing" change in methodology in part because respondent could not demonstrate reliance on prior methodology).

There is a second limitation on Commerce's ability to change its methodology, however; as in every instance where an agency changes tack, it must provide a reasoned explanation for doing so. See *RHP Bearings Ltd. v. United States*, 24 CIT ___, ___, 120 F. Supp. 2d 1116, 1124 (2000) ("Although the application of the special rule in only two prior reviews does not form a long-established practice under the circumstances presented here, Commerce is under an obligation to explain the apparent inconsistency of its approach in this review and the two preceding reviews."); *Cinsa, S.A. de C.V. v. United States*, 21 CIT 341, 349, 966 F. Supp. 1230, 1238 (1997) ("Commerce can reach different determinations in separate administrative reviews but it must employ the same methodology or give reasons for changing its practice.").

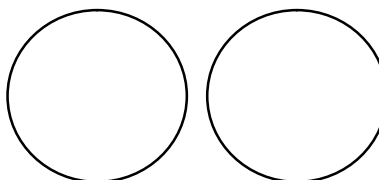
In this case, Commerce did not provide a sufficient explanation. Instead, in response to the plaintiffs' objections to the change in methodology, it engaged in semantic absurdities³⁶ and then explained in the broadest terms that "verification objectives, testing, and results vary with the review segment, company, and facts." *Final Results*, 64 Fed. Reg. at 43,665. About its change in methodology Commerce said no more, except to cite as evidence of its consistent approach the final results from a different proceeding that do not, in fact, appear to demonstrate such consistency at all. See *Natural Bristle Paintbrushes and Brush Heads from the PRC; Final Review Results of Antidumping Duty Admin. Review*, 64 Fed. Reg. 27,506, 27,510 (May 20, 1999) ("[A]t no time during the verification or in the preliminary results of review, did [Commerce] attribute the verification failure of [the respondent's] supplier to the quality of its financial statements."). Accordingly, the Court finds that Commerce has failed to provide a reasoned explanation for its change in methodology.³⁷ The Court remands this issue in order that Commerce may now do so.

2. Factory B's unreported factors of production

At verification, Commerce found that Factory B had failed to report three factors of production—[]. The plaintiffs argue that under Commerce's precedent, Factory B was correct not to report these three items as factors of production, because they are not physically incorporated into the final product. See Pls.' Memo, at 36–38; Pls.' Case Brief, at 53–55. Commerce does not respond to this claim in its briefs before the Court; in the *Final Results*, Commerce merely stated that "[t]here was no way to confirm these claims at verification." 64 Fed. Reg. at 43,667.

³⁶ "It is not entirely accurate to say that [we] accepted 'caps' in previous reviews. Rather, * * * we confirmed that * * * the 'caps' were reasonable approximations of actual consumption. As such we used this data to calculate NV." *Final Results*, 64 Fed. Reg. at 43,665.

³⁷ The same analysis applies to Commerce's findings regarding Factory A's lack of records tying its purchases of steel to its consumption of steel.



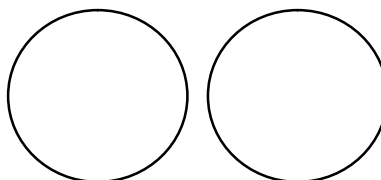
The Court agrees with the plaintiffs that Commerce's historical practice has been to treat not as factors of production, but rather as factory overhead, those items that are not physically incorporated into the subject merchandise. See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Brake Drums and Brake Rotors from the PRC*, 62 Fed. Reg. 9,160, 9,169 (Feb. 28, 1997) ("We agree that [six items] are indirect materials and should be treated as part of factory overhead, because the function of these materials is to 'assist' in the manufacturing process and do [sic] not enter physically into the composition of the finished product."). In fact, Commerce made a similar finding in an earlier review of the antidumping duty order at issue in this case. See *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the PRC: Final Results of Antidumping Duty Admin. Reviews*, 60 Fed. Reg. 49,251, 49,254 (Sept. 22, 1995) ("We agree with respondents that pellets and detergent should be considered as factory overhead, and have changed our analysis accordingly. These items * * * are not physically incorporated into the subject merchandise. As such, they should not be valued as direct material inputs in the production of the subject merchandise."). In the instant case, the verifiers' report strongly suggests that the three unreported alleged factors of production, [], also were not physically incorporated into the subject merchandise. See Pls.' App. 18, [Factory B]: Report on the Verification of Factors Information Submitted in the Administrative Review Covering February 1, 1997, through January 31, 1998 ("Factory B Verification Report"), at 6. The plaintiffs have thus made a prima facie case that Commerce erred in determining that it these three items were unreported factors of production.

Again, Commerce has failed sufficiently to explain its apparent change in methodology and departure from precedent. Its bare assertion that the claims could not be confirmed at verification is unconvincing; the verifiers observed with their own eyes the purposes for which the three items were put to use. See *id.* If, nevertheless, they continued to entertain any doubts as to whether the three items were physically incorporated, then Commerce should have stated so. Instead, Commerce's tendency to disguise its lack of thoroughness through vague and nonresponsive assertions does a disservice both to the respondents and to this Court.

The Court remands this issue to Commerce with instructions that, unless Commerce can demonstrate that it has changed its methodology (and post hoc rationalizations will not suffice for this purpose) or can adduce substantial evidence showing that Factory B failed to prove that the three items were not physically incorporated, it must find that Factory B did not fail to report any factors of production.

II. Commerce's Decision to Apply the PRC-Wide Rate is Contrary to Law

The plaintiffs also protest Commerce's decision to deny separate rates to FMEC and SMC, and instead to use the PRC-wide rate. Under U.S. antidumping law, special rules apply to the determination of normal val-



ue of subject merchandise exported from nonmarket economy countries. *See* 19 U.S.C. § 1677b(c) (1994). For purposes of the antidumping statutes, the PRC is a nonmarket economy pursuant to 19 U.S.C. § 1677(18) (1994).

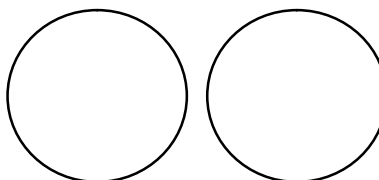
Commerce permits individual exporters in a nonmarket economy to receive separate, company-specific rates, by demonstrating that they operate independently of central government control. *See Manganese Metal From the PRC; Final Results and Partial Rescission of Antidumping Duty Admin. Review*, 63 Fed. Reg. 12,440, 12,441 (March 13, 1998). However, there is a presumption of state control; the exporter must prove both *de jure* and *de facto* independence. *See Final Determination of Sales at Less Than Fair Value: Sparklers From the PRC*, 56 Fed. Reg. 20,588, 20,589 (May 6, 1991). Evidence that Commerce will consider in support of a claim of *de jure* independence includes: “(1) An absence of restrictive stipulations associated with an individual exporter’s business and export licenses; (2) any legislative enactments decentralizing control of companies; or (3) any other formal measures by the government decentralizing control of companies.” *Coalition*, 23 CIT at ___, 44 F. Supp. 2d at 242 (citing *Sparklers From the PRC*, 56 Fed. Reg. at 20,589). Factors that are probative of *de facto* independence include:

- (1) whether each exporter sets its own export prices independently of the government and other exporters;
- (2) whether each exporter can keep the proceeds from its sales;
- (3) whether the Respondent has authority to negotiate and sign contracts and other agreements; and
- (4) whether the Respondent has autonomy from the government in making decisions regarding the selection of management.

Coalition, 23 CIT at ___, 44 F. Supp. 2d at 243; *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the PRC*, 59 Fed. Reg. 22,585, 22,587 (May 2, 1994).

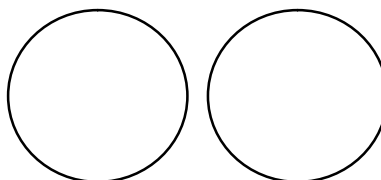
Commerce has previously stated that “once a Chinese company has demonstrated that it is entitled to a separate rate, unless there is an indication that its status may have changed, it is not necessary for that company to resubmit data supporting a separate rate during subsequent reviews.” *Certain Iron Construction Castings from the PRC; Final Results of Antidumping Admin. Review*, 57 Fed. Reg. 24,245, 24,246 (June 8, 1992). Although FMEC and SMC apparently established that they were entitled to separate rates in each of the preceding reviews,³⁸ Commerce nevertheless included questions on the separate rates issue in its initial questionnaires to FMEC and SMC.

³⁸ The plaintiffs made this unsubstantiated allegation in their submissions to Commerce and to this Court. *See* Pls.’ App. 3, Antidumping Admin. Review—HFHTs for the PRC—FMEC Response to Department’s April 23, 1998 Questionnaire—Section A (“FMEC’s Questionnaire Response”), at 2; Pls.’ Memo. at 40. Commerce acknowledged in the *Preliminary Results* that FMEC and SMC had received separate rates in “several previous segments of these proceedings,” including the 1996–97 reviews. 64 Fed. Reg. at 5,772. In addition, the public record supports the plaintiffs’ claim. *See Heavy Forged Hand Tools From the PRC; Final Results of Antidumping Duty Admin. Reviews*, 62 Fed. Reg. 11,813, 11,818–19 (March 13, 1997) (noting that FMEC and SMC had received separate rates for the 1994–95 reviews and assigning separate rates for the 1995–96 reviews); *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the PRC; Amendment of Final Results of Antidumping Duty Admin. Review*, 61 Fed. Reg. 24,285, 24,286 (May 14, 1996) (noting that FMEC and SMC received separate rates for the 1992–93 reviews).



In their questionnaire responses, both FMEC and SMC noted that nothing had changed with regard to their independent status since the previous reviews. See FMEC's Questionnaire Response at 2; Pls.' App. 13, Antidumping Admin. Review—HFHTs for [sic] the PRC—SMC Response to Department's April 23, 1998 Questionnaire—Section A ("SMC's Questionnaire Response"), at 2. In answering each of Commerce's questions, both FMEC and SMC made a convincing *prima facie* case of *de jure* and *de facto* independence. With regard to their legal autonomy, both FMEC and SMC explained that they are independent from the national, provincial, and local governments, and possess business licenses that permit the import and export of a range of equipment, machinery, and other industrial and manufacturing products, but otherwise contain no restrictive stipulations. Although each is supervised by a provincial administrative agency, they are solely responsible for their business decisions. FMEC's Questionnaire Response, at 2–4; SMC's Questionnaire Response, at 2–4. They also provided copies of the national law decentralizing trading companies, as well as their business licenses. FMEC's Questionnaire Response exhs. 1 & 2; SMC's Questionnaire Response exhs. 1 & 2. To prove independence in fact, FMEC and SMC alleged that they set their own prices, actively competed with other Chinese exporters of the subject merchandise, kept their own profits, made their own business decisions, and selected their own managers. FMEC's Questionnaire Response at 2–8; SMC's Questionnaire Response at 2–9. Commerce acknowledged in the *Preliminary Results* that these responses were "complete." 64 Fed. Reg. at 5,772. Had it been otherwise, Commerce would have been obliged to request further information. See *Sigma Corp. v. United States*, 17 CIT 1288, 1303, 841 F. Supp. 1255, 1267 (1993) ("The burden of proof to show that a company is independent is on the respondent, but if it has not supplied enough information, the burden shifts to Commerce to ask for more information."), *aff'd in part and rev'd in part on other grounds*, 15 Fed. Cir. (T) ___, 117 F.3d 1401 (1997).

"Once an exporter has submitted information to establish its independence from the state, it then becomes Commerce's duty to verify the information submitted by the respondent." *Id.* at 1302, 841 F. Supp. at 1266. However, the verification outlines that Commerce issued to FMEC and SMC did not indicate that Commerce intended to verify their answers to the separate rates questions. See FMEC Verification Outline; SMC Verification Outline. The verifying officials did not verify any information specifically related to the separate rates issue, except to review FMEC's and SMC's business licenses. See FMEC Verification Report; Pls.' App. 15, SMC: Report on the Verification of Sales Info. Submitted in the Admin. Review Covering February 1, 1997, through January 31, 1998 ("SMC Verification Report"). Nor is any item related to separate rates listed among the "issues discovered at verification" in the verification reports. See FMEC Verification Report, at 2; SMC Verification Report, at 2.



Nevertheless, Commerce determined that FMEC and SMC had not established their entitlement to separate rates. In a single brief paragraph, Commerce explained its reasoning as follows:

[T]he failure to satisfy requests for information that would confirm various elements of these firms' questionnaire responses directly compromised the information that formed the basis of these entities' separate rates' [sic] claims. More specifically, we determined that, due to the nature of the verification failures of SMC and FMEC and the inadequacy of their cooperation, it was not possible to confirm information regarding these entities' affiliations, ownership arrangements, and corporate structure. Thus, even though we did not directly examine all aspects of these firms' separate rates' [sic] claims at verification, the separate rates' [sic] claims were called into question because the data unsuccessfully addressed at verification were key to our separate rates' [sic] analysis.

Final Results, 64 Fed. Reg. at 43,669 (citation omitted).

Commerce's explanation explains nothing. The essence of a separate rates analysis is to determine whether the exporter is an autonomous market participant, or whether instead it is so closely tied to the communist government as to be shielded from the vagaries of the free market.³⁹ None of the putative verification failures identified by Commerce appear to relate to this issue at all,⁴⁰ an omission made especially glaring by the fact that FMEC and SMC had demonstrated their independence in numerous consecutive preceding reviews. Accordingly, the Court finds that Commerce has failed to show by substantial evidence that FMEC and SMC were not entitled to separate rates.

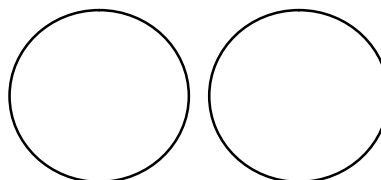
III. Commerce's Decision to Apply Adverse Facts Available is Contrary To Law

The final issue in this case concerns Commerce's decision to apply adverse facts available. Under the United States antidumping laws, if a respondent withholds or fails to provide information requested by Commerce, significantly impedes a proceeding, or provides information that is not verifiable, Commerce shall "use the facts otherwise available in reaching the applicable determination." 19 U.S.C. § 1677e(a)(2) (1994). If Commerce finds that the respondent "has failed to cooperate by not acting to the best of its ability to comply with a request for information * * * [Commerce] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b).

³⁹ "The antidumping statute recognizes a close correlation between a nonmarket economy and government control of prices, output decisions, and the allocation of resources." *Sigma Corp. v. United States*, 15 Fed. Cir. (T) ___, ___, 117 F.3d 1401, 1405-06 (1997).

⁴⁰ For example, the *Final Results* refer to Commerce's inability "to confirm information regarding these entities' affiliations." 64 Fed. Reg. at 43,669. The only unresolved affiliation issue discussed in the AFA Memo involves FMEC's and SMC's relationships with their respective affiliated United States entities, which bear on the issue of determining a constructed export price, not on their affiliation (or lack thereof) with any Chinese government-dominated entities.

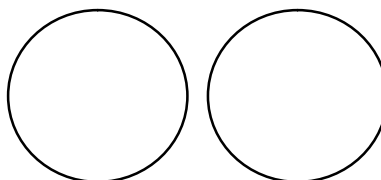
By way of contrast, in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the PRC; Preliminary Results of Antidumping Admin. Review and Partial Termination of Admin. Review*, 62 Fed. Reg. 36,764 (July 9, 1997), Commerce denied separate rates to one exporter that refused to allow on-site verification, and to another exporter that did not timely respond to a supplemental questionnaire and whose "initial questionnaire response was incomplete, particularly with regard to separate rates issues * * *." *Id.* at 36,768 (emphasis added).



The plaintiffs argue that even if Commerce properly determined that FMEC, SMC, and the Factories failed verification (and must therefore use facts available), it may not use AFA because it has not demonstrated that they failed to cooperate to the best of their ability. Pls.' Memo, at 18. In particular, they claim that the unreported sales were *de minimis* and that the failure to report them was inadvertent, the result of inadequate computer systems. *Id.* at 20. They also argue that because Commerce calculated separate rates for each of the four classes of subject merchandise, FMEC's and SMC's failure to report sales for one or two classes does not allow Commerce to use AFA for the other classes. *Id.* at 16–17. Finally, the plaintiffs maintain that under applicable CIT precedent, Commerce may not apply AFA unless it makes a specific finding that they failed to act to the best of their ability, *id.* at 19–20, and that such failure was deliberate or willful. Reply Brief of Pls. FMEC and SMC, at 15.

Commerce argues that AFA is appropriate because it specifically found that the plaintiffs had failed to provide sufficient sales information for the calculation of an accurate dumping margin. *See* Commerce's Memo, at 30. Commerce claims that the plaintiffs should have known from their experience in prior reviews that they needed to be more vigilant about reporting sales, *id.* at 34, and that under CIT precedent no proof of willfulness or deliberateness is necessary to impose AFA. *Id.* at 37. In Commerce's view, the plaintiffs' lack of advanced computer capabilities does not "entitle[] them to underreport and affirmatively misstate during a review." *Id.* at 35. Commerce also argues that the plaintiffs' total failure to report sales of bars/wedges is particularly egregious because they had asked Commerce to rescind its review of that class of merchandise. *Id.* at 35.

The Court finds that Commerce's decision to impose AFA is not supported by substantial evidence and is not otherwise in accordance with law. As the parties have noted, "Once Commerce has determined under 19 U.S.C. § 1677e(a) that it may resort to facts available, it must make additional findings prior to applying 19 U.S.C. § 1677e(b) and drawing an adverse inference." *Ferro Union, Inc. v. United States*, 23 CIT ___, ___, 44 F. Supp. 2d 1310, 1329 (1999); *accord Mannesmannrohren-Werke AG v. United States* ("*Mannesmannrohren-Werke I*"), 23 CIT ___, ___, 77 F. Supp. 2d 1302, 1313–14 (1999); *Kawasaki Steel Corp. v. United States*, 24 CIT ___, ___, 110 F. Supp. 2d 1029, 1034 (2000) ("It has been well established by the court that a 'mere recitation of the relevant [AFA] standard is not enough for Commerce to satisfy its obligation under the statute.'" (citations omitted). "In order for its finding to be supported by substantial evidence, 'Commerce needs to articulate why it concluded that a party failed to act to the best of its ability, and explain why the absence of this information is of significance to the progress of its investigation.'" *Nippon Steel Corp. v. United States* ("*Nippon Steel I*"), 24 CIT ___, ___, 118 F. Supp. 2d 1366, 1378 (2000) (quoting *Man-*

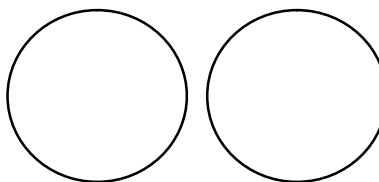


nesmannrohren-Werke I, 23 CIT at ___, 77 F. Supp. 2d at 1313–14 (omitting citation)).

The Court agrees with the plaintiffs that Commerce has not adduced substantial evidence to support the application of AFA, in either the AFA Memo, the *Preliminary Results*, the *Final Results*, or its briefs before this Court. The author of the AFA Memo, one of the verifying officials, listed the major problems at verification, and then proceeded to assume that such problems supported the use of AFA, without discussing why, effectively skipping two steps of a proper AFA analysis. See AFA Memo, at 3 (stating, without first determining that facts available should apply or that plaintiffs had not acted to the best of their abilities, that the only issue was the choice between partial AFA and total AFA).

In the *Final Results*, as in the *Preliminary Results*, Commerce gave two reasons for its decision to apply AFA: (1) the PRC entity had failed to cooperate; and (2) “the accuracy of SMC’s and FMEC’s individual responses could not be substantiated at verification. These verification failures were the direct result of these companies’ failure to supply a wide variety of information.” *Final Results*, 64 Fed. Reg. at 43,667–68; see also *Preliminary Results*, 64 Fed. Reg. at 5,772 (using nearly identical language). Commerce gave no further explanation, except to refute the plaintiffs’ claim that its decision in a different proceeding precluded the use of AFA under the facts of this review. *Final Results*, 64 Fed. Reg. at 43,668. Commerce’s brief before this Court continues in this vein, arguing that Commerce specifically found that plaintiffs had provided insufficient sales information, and that in light of the plaintiffs’ experience with antidumping investigations, *ipso facto* they had not cooperated to the best of their abilities. See Pls.’ Memo, at 30, 34.

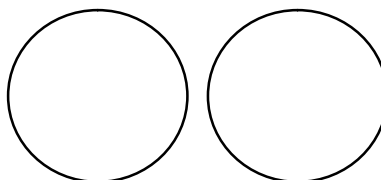
Commerce’s reasoning is inadequate, because it suggests that AFA inevitably follows from its finding that the plaintiffs failed verification. Ample precedent from the CIT demonstrates that AFA is not a mere tautology, however. Instead, Commerce must show that FMEC and SMC had the ability to comply but did not do so. See *Nippon Steel Corp. I*, 24 CIT at ___, 118 F. Supp. at 1378–79 (“At a minimum, Commerce must find that a respondent could comply, or would have had the capability of complying if it knowingly did not place itself in a condition where it could not comply.”); *Borden, Inc. v. United States*, 22 CIT 233, 265, 4 F. Supp. 2d 1221, 1247 (1998) (“Given the history of [respondent’s] numerous communications, explanations, and submissions to Commerce, if there is no evidence that [respondent] could have provided all the information Commerce wanted in a timely manner, Commerce may not draw an adverse inference.”), *aff’d in part sub nom. F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 18 Fed. Cir. (T) ___, 216 F.3d 1027 (2000), *rev’d in part on other grounds sub nom. Borden, Inc. v. United States*, 2001 WL 312232 (Fed. Cir. 2001) (unpublished opinion); *Krupp Thyssen Nirosta GMBH v. United States*, slip op. 00–89, at 14–15, 2000 WL 1118114, at *7 (Ct. Int’l Trade July 31, 2000) (remanding for reconsideration of AFA because Commerce failed to address the “critical



issue * * * whether [respondent] had the resources available to it *prior* to verification to discover the errors”) (emphasis in original). Moreover, even if Commerce does demonstrate that the respondent had the ability to comply, if the respondent pleads that “it did not do so because of simple inadvertence, [Commerce] must show more.” See *Nippon Steel Corp. v. United States* (“*Nippon Steel II*”), 25 CIT ___, ___, 146 F. Supp. 2d 835, 841 (2001). Possible factors include multiple erroneous submissions, non-responsive answers to multiple inquiries, and other evidence of a “pattern of unresponsiveness” or that “strongly indicat[es] a specific intent on the part of the respondent to evade [Commerce’s] requests for information.” *Id.* at 840 (internal quotation marks omitted) (distinguishing *Mannesmannrohren-Werke AG v. United States* (“*Mannesmannrohren-Werke II*”), 24 CIT ___, ___, 120 F. Supp. 2d 1075, 1077–80, 1084–87 (2000)).

Although Commerce is correct that it need not find willful or deliberate noncompliance, see *Nippon Steel I*, 24 CIT at ___, 118 F. Supp. 2d at 1378 (“A finding of willfulness, * * * in the sense of a deliberate decision not to comply is not always a prerequisite to the drawing of an adverse inference.”), where it cannot demonstrate such willfulness, it must tread especially carefully. See *Nippon Steel II*, 25 CIT at ___, 146 F. Supp. 2d at 841–42 (“[T]hose cases that do not suggest willfulness on the part of the respondent pose particular challenges for [Commerce] to draw appropriate lines.”). The more complex the review, the greater the need for such restraint. See *id.* at ___, 146 F. Supp. 2d at 841 (“[The respondent’s] efforts must also be viewed in the context of what [Commerce] recognized as a difficult case raising ‘unique and complex issues.’”); *Final Results*, 64 Fed. Reg. at 43,660 (acknowledging that Commerce had been obliged to extend the deadline for issuing the *Final Results* because the review was “extraordinarily complicated”). “[A] completely errorless investigation is simply not a reasonable expectation. Even the most diligent respondents will make mistakes, and Commerce must devise a non-arbitrary way of distinguishing among errors.” *Nippon Steel II*, 25 CIT at ___, 146 F. Supp. 2d at 841 n.10.

There is abundant record evidence tending to show that most of the problems associated with verification, from the unreported sales (and the concomitant request to rescind the review with respect to bars/wedges) to the Factories’ inability to trace caps to accounting records, were inadvertent and directly attributable to the inadequate accounting and computing resources of the plaintiffs and their suppliers’ factories. Commerce, however, declined to take this factor into account. See Commerce’s Memo, at 34 (“[P]laintiffs’ claims that its [sic] omissions [sic] are merely inadvertent, unintentional, and insignificant, depreciates Commerce’s role in gathering accurate sales data.”). This refusal is not in accordance with law. See *Borden*, 22 CIT at 264, 4 F. Supp. 2d at 1246 (remanding for reconsideration of AFA where “Commerce seem[ed] to have leaped to the conclusion that [respondent] willingly did not comply and to have misapprehended, or not adequately considered, [respon-



dent's] repeated statements that it *did not have a cost accounting system*") (emphasis in original).

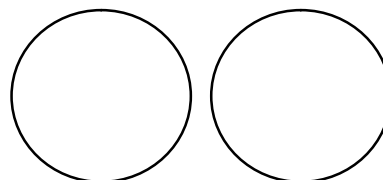
Commerce's claim that the plaintiffs' experience in preceding reviews exacerbates their failures in this one likewise fails. Their experience would be germane only if Commerce could show that prior reviews had served to give them notice of deficiencies in their cooperation, *see Nippon Steel II*, 25 CIT at ___, 146 F. Supp. 2d at 839 ("[Commerce] has not shown * * * that the inadvertence claimed in this case also occurred in another review, or that the specific element focused on in a previous review * * * is also at issue in this case."); *NSK Ltd.*, 19 CIT at 1026, 896 F. Supp. at 1274 (noting that Commerce had "explicitly warned" respondent during the first review that its reporting methodology would not be accepted in subsequent reviews), or if Commerce could point to their specific actions in prior reviews that would tend to prove they had the ability to cooperate in the present review. *See Nippon Steel II*, 25 CIT at ___, 146 F. Supp. 2d at 841. *See also Gourmet Equip.*, slip op. 00-78, at 16, 2000 WL 977369, at *4 ("Past participation may be relevant to notice, knowledge, and reliance issues."). Instead, the record suggests that the plaintiffs' sudden failures in this review owe more to changes in Commerce's methodology than to any newfound disinclination to cooperate. Within the constraints discussed above, Commerce has wide latitude to adapt its methodology, but when by doing so it imposes new burdens on respondents, it must take those burdens into account in making its AFA decision.⁴¹

Commerce's decision to apply AFA is also unsupported by substantial evidence because it was based in considerable part on the lack of cooperation of the PRC entity. For the reasons discussed *supra*, in Part II, FMEC and SMC are entitled to separate rates. Therefore, it would be grossly unfair to hold them responsible for MOFTEC's non-responsiveness to a separate rates inquiry.⁴²

Accordingly, the Court remands so that Commerce may reconsider its decision to apply AFA to SMC, as well as to FMEC if Commerce determines on remand that FMEC or the Factories failed verification. In so ordering, the Court does not predetermine the outcome on remand, as there are numerous ambiguities in the record.

⁴¹ Evidence of this factor in the present review is particularly strong with respect to the Factories, who did not even receive notice in the verification outlines that Commerce intended to require tracing of caps to accounting statements. *See* FMEC Verification Outline, accompanying letter at 2; SMC Verification Outline, accompanying letter at 2; Pls.' Case Brief, at 51. *Cf. NSK Ltd.*, 19 CIT at 1026, 896 F. Supp. at 1274.

⁴² In an antidumping investigation, under some circumstances Commerce may impose AFA on a respondent for the failure of a non-respondent to cooperate with the investigation, although its ability to do so is more restricted than under the precursor to the AFA statute. *See, e.g., Helmerich & Payne, Inc. v. United States*, 22 CIT 928, 932 n.6, 24 F. Supp. 2d 304, 309 n.6 (1998); *Kawasaki Steel*, 24 CIT at ___, 110 F. Supp. 2d at 1033-39 (upholding use of AFA where respondent failed to use its best efforts to persuade its U.S. affiliate, a petitioner in the review, to supply requested information necessary to determine CEP). In all such cases, however, there is some sort of privity, whether contractual, commercial, or ownership, between the respondent and the uncooperative third party. In the absence of evidence of such privity between FMEC or SMC and MOFTEC, it is unreasonable to impute MOFTEC's silence to the plaintiffs.



CONCLUSION

For all of the foregoing reasons, the Court sustains Commerce's *Final Results* in part and remands in part. A separate order will be entered accordingly.

(Slip Op. 01-121)

BRANCO PERES CITRUS, S.A., PLAINTIFF *v.* UNITED STATES OF AMERICA,
DEFENDANT, AND FLORIDA CITRUS MUTUAL, DEFENDANT-INTERVENOR

Court No. 99-09-00560

Brazilian producer and exporter of frozen concentrated orange juice brought action contesting United States Department of Commerce's ("Commerce") final results in administrative review of antidumping order. Brazilian producer, by its complaint, challenged: (1) Commerce's determination that it had failed to cooperate to best of its ability with Commerce's request for cost of production information, which it possessed at time of initiation of review, and Commerce's consequent use of adverse inferences drawn from facts otherwise available, despite Brazilian producer's contention that it did not, at time request was made, possess such information due to sale of frozen concentrated orange juice facility; and (2) Commerce's selection of Brazilian producer's highest transaction-specific dumping margin, calculated with use of Brazilian producer's own sales data, as well as industry-wide cost data, as Brazilian producer's facts available rate. The United States ("Government"), on behalf of Commerce, and defendant-intervenor claimed that: (1) Commerce's determination that Brazilian producer had failed to cooperate to best of its ability and, therefore, its use of adverse inferences, was supported by substantial evidence on the record and was otherwise in accordance with law; and (2) Commerce properly acted within its discretion in its selection of adverse facts available rate for Brazilian producer. The United States Court of International Trade, Eaton, J., held: (1) Commerce's conclusion that Brazilian producer had failed to act to best of its ability to comply with Commerce's request for information and, hence, its determination that the application of adverse inferences was appropriate, was supported by substantial evidence on the record and was otherwise in accordance with law because Brazilian producer would have had capability to comply, had it not knowingly placed itself in condition where it might not be able to do so, and as its behavior fell below standard for reasonable respondent; and (2) Commerce's selection of Brazilian producer's highest transaction-specific dumping margin, calculated with use of Brazilian producer's own sales data, as well as industry-wide cost data available on record, as Brazilian producer's facts available rate, was reasonable. [Plaintiff's motion for judgment upon agency record denied.]

(Decided October 3, 2001)

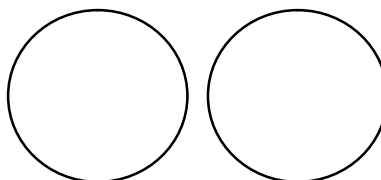
Willkie Farr & Gallagher (Christopher Dunn and Julia K. Eppard), for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General of the United States; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Janene M. Marasciullo*); of counsel: *Mildred Stewart*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for Defendant.

Barnes, Richardson & Colburn (Matthew T. McGrath and Michael J. Chessler), for Defendant-Intervenor.

OPINION

EATON, *Judge*: Plaintiff Branco Peres Citrus, S.A. ("Plaintiff") moves pursuant to USCIT R. 56.2 for judgment upon the agency record in an



action challenging the final results of the United States Department of Commerce's ("Commerce") eleventh administrative review of the antidumping order on frozen concentrated orange juice from Brazil. *See Frozen Concentrated Orange Juice From Brazil; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 64 Fed. Reg. 43,650 (Aug. 11, 1999) ("Final Results"). The court has jurisdiction, *see* 28 U.S.C. § 1581(c) (1994), and, for the reasons set forth below, denies Plaintiff's motion.

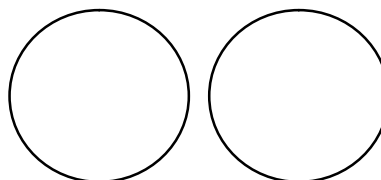
BACKGROUND

Plaintiff is a Brazilian producer and exporter of frozen concentrated orange juice. In June 1998, at the request of Defendant-Intervenor Florida Citrus Mutual ("Defendant-Intervenor") and other domestic producers of frozen concentrated orange juice, Commerce initiated the eleventh administrative review of the antidumping order on frozen concentrated orange juice from Brazil. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 63 Fed. Reg. 35,188 (June 29, 1998).¹ The review covered U.S. sales of frozen concentrated orange juice made by Plaintiff and five other foreign producers and exporters between May 1, 1997, and April 30, 1998. *See Frozen Concentrated Orange Juice From Brazil; Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 64 Fed. Reg. 5,767 (Feb. 5, 1999) ("Preliminary Results").

At the outset of its investigation, Commerce sent an antidumping questionnaire to Plaintiff and each of the other foreign producers being reviewed. In its accompanying letter to Plaintiff, Commerce requested responses to sections A, B, and C of the questionnaire, which related to general information, sales in the home market or to third countries, and sales to the United States, respectively. (Letter from Maeder to Dunn of 6/12/98, at 1, Pl.'s App., Tab 10.) At that time, Commerce did not request any data relating to Plaintiff's cost of production. (*Id.* at 1-2 ("You are not currently required to respond to section D (Cost of Production/Constructed Value).").) Commerce did, though, advise Plaintiff, "if the petitioner alleges that your sales in the home or third country market are at prices below the cost of production, we may request that you respond to section D at a later date." (*Id.* at 1-2.) Approximately two weeks later, on July 1, 1998, Plaintiff sold its frozen concentrated orange juice business.² (Pl.'s Mem. Supp. Mot. J. Agency R. at 7; Pl.'s Reply Mem. Supp. Mot. J. Agency R. at 5.) According to Plaintiff, "[i]ncluded in this sale were all of [its] cost of production records." (Pl.'s Mem. Supp. Mot. J. Agency R. at 7.) Plaintiff did, however, "retain copies of its price documents because of the need to respond to [Commerce's] antidumping

¹ As this review was initiated after December 31, 1994, all citations to the antidumping statute are to the current version, as amended by the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) ("URAA"). *See* URAA § 291(a)(2), (b) (setting forth effective date of amendments); *FAG Kugelfischer Georg Schafer AG v. United States*, 25 CIT ___, ___, 131 F. Supp. 2d 104, 109 (2001).

² During the administrative review, Plaintiff's sale of its frozen concentrated orange juice business was treated as proprietary business information. *See, e.g., Final Results*, 64 Fed. Reg. at 43,653. Plaintiff, however, "no longer requests confidential treatment of such information" (Pl.'s Mem. Supp. Mot. J. Agency R. at 4 n.3), as the sale "has since been made public" (*id.*).



questionnaire.” (*Id.*) Plaintiff timely responded to Commerce’s initial questionnaire, *see Preliminary Results*, 64 Fed. Reg. at 5,767, and to a supplemental questionnaire delivered shortly thereafter. *See id.*

In the interim, the domestic producers submitted to Commerce a letter alleging that Plaintiff, during the period of review, had made sales at prices below its cost of production. (*See* letter from McGrath & Chessler to Daley of 9/1/98, Pl.’s App., Tab 8.) Commerce initiated a cost of production investigation, *see Preliminary Results*, 64 Fed. Reg. at 5,767, and, on October 15, 1998, requested from Plaintiff a response to section D of its initial questionnaire, which related to cost of production. (*See* letter from Maeder to Dunn of 10/15/98, Pl.’s App., Tab 12.) By letter dated November 12, 1998, Plaintiff informed Commerce that it was “unable to respond to [Commerce’s] questionnaire on cost of production, owing to lack of information.” (Letter from Dunn to Daley of 11/12/98, at 1, Pl.’s App., Tab 2.) Plaintiff reported that it had sold its frozen concentrated orange juice operations and was “unable to locate any documents relating to the cost of producing [frozen concentrated orange juice] in Brazil. Under the circumstances,” Plaintiff stated, “it is simply not possible for us to respond to [Commerce’s] cost questionnaire.” (*Id.* at 2; *see also* Pl.’s Mem. Supp. Mot. J. Agency R. at 9 (asserting that its “factory, administrative offices and all records [had been transferred] as part of this sale”) (quoting letter from Dunn to Daley of 11/12/98, at 2, Pl.’s App., Tab 2).) Plaintiff did not return section D, and Commerce did not solicit any further explanation.

In February 1999, Commerce issued its preliminary determination that Plaintiff had, during the period of review, made sales at prices below normal value,³ *see Preliminary Results*, 64 Fed. Reg. at 5,767, and assigned to Plaintiff a 65.2 percent dumping margin based on adverse inferences drawn from facts otherwise available.⁴ Commerce stated that, “[b]ecause [Plaintiff has] failed to respond to certain questionnaires and [has] refused to participate fully in this administrative review * * * the use of total facts available is appropriate.” *Id.* at 5,768. In addition, Commerce stated, Plaintiff’s “failure * * * to participate in the review and to respond to [Commerce’s] questionnaires demonstrates that [it has] failed to act to the best of its ability in this review and, therefore, an adverse inference is warranted.” *Id.* Commerce also reported that, in calculating Plaintiff’s dumping margin, it had declined to follow the “normal practice,” *see id.*, of selecting as the adverse facts available mar-

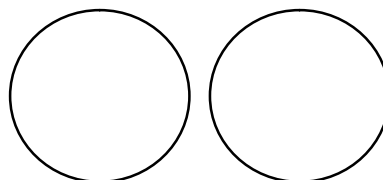
³ Normal value, and its significance in Commerce’s calculation of a party’s dumping margin, has been summarized as follows:

Commerce generally calculates the antidumping duty by comparing an imported product’s price in the United States to its normal value * * *, which represents the price of comparable merchandise in the exporting country. The dumping margin is the amount by which [normal value] exceeds the US price.

The US price is calculated as either [export price] or [constructed export price]. Usually, [export price] is used when the foreign exporter sells directly to an unrelated US purchaser, and [constructed export price] is used when the exporter sells through a related party in the United States which performs substantial selling functions.

Ta Chen Stainless Steel Pipe, Ltd. v. United States, 23 CIT ___, ___, n.2, Slip Op. 99-117, at 5 n.2 (Oct. 28, 1999) (internal citations omitted) (“*Ta Chen I*”).

⁴ Typically referred to as “facts available,” *see, e.g., NTN Bearing Corp. v. United States*, 25 CIT ___, ___, 132 F. Supp. 2d 1102, 1108 (2001) (“*NTN I*”), and previously referred to, under the pre-URAA scheme, as “best information available.” *See, e.g., Mannesmannrohr n-Werke AG v. United States*, 23 CIT ___, ___, n.4, 77 F. Supp. 2d 1302, 1312 n.4 (1999).



gin the highest margin from the current or any prior segment of the proceeding, in this case, 2.52 percent, because use of such margin would allow Plaintiff to “benefit from [its] lack of cooperation.” *Id.* Consequently, Commerce stated, it had used data on the record of the proceeding for the purpose of calculating sales-specific dumping margins, namely, the publicly available industry-wide cost data provided by the domestic producers in the cost allegation, as well as the company-specific sales data provided by Plaintiff and one other foreign producer. *See id.* at 5,768. Commerce then selected the highest overall sales-specific margin calculated in this manner, 65.2 percent, as the facts available rate for Plaintiff and the other “non-cooperating respondents.” *Id.*

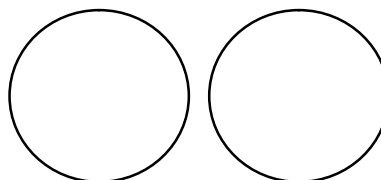
In its subsequent comments to Commerce, Plaintiff reiterated that it was “unable to respond to [Commerce’s] questionnaire on cost of production, owing to lack of information.” (Letter from Dunn to Daley of 3/30/99, at 4, Pl.’s App., Tab 1 (quoting letter from Dunn to Daley of 11/12/98, at 1, Pl.’s App., Tab 2).) Nonetheless, Commerce in its final results maintained that, with respect to Plaintiff, use of total facts available, as well as adverse inferences, was reasonable, supported by evidence on the record, and otherwise in accordance with law. *See Final Results*, 64 Fed. Reg. at 43,655. Commerce did, however, reconsider the methodology originally used to select an adverse facts available rate for Plaintiff, *see id.*, and assigned Plaintiff a final margin based on Plaintiff’s own sales data alone (and not, as had been the case in its preliminary determination, on the sales data provided by Plaintiff and one other foreign producer), and on the publicly available industry-wide cost data provided by the domestic producers in the cost allegation. *See id.* at 43,657. Specifically, Commerce used this data to calculate transaction-specific dumping margins for Plaintiff, and then selected from among these margins, as Plaintiff’s facts available rate, its highest transaction-specific dumping margin. The final rate thus assessed was 39.18 percent. *See id.* at 43,659.

Plaintiff subsequently commenced this action. Plaintiff’s complaint challenges two aspects of Commerce’s final results: (1) Commerce’s determination that Plaintiff did not comply to the best of its ability with Commerce’s request for information, and its consequent resort to the use of adverse inferences;⁵ and (2) Commerce’s selection of the highest

⁵Plaintiff raises here, for the first time, two arguments related to Commerce’s use of facts otherwise available. Plaintiff claims that: (1) Commerce’s conclusion that it “withheld information” and, hence, Commerce’s resort on these grounds to the use of facts available, is not supported by the record (*see* Pl.’s Reply Mem. Supp. Mot. J. Agency R. at 2 (“As a threshold matter, [Plaintiff] did not withhold information and therefore [Commerce’s] decision to use facts available on this basis is not supported by the evidence on the record.”)); and (2) Commerce failed to notify it of, and provide it with an opportunity to remedy or explain, any deficiencies in its alleged response to Commerce’s request for cost information, in violation of 19 U.S.C. § 1677m(d) (*see, e.g.,* Pl.’s Mem. Supp. Mot. J. Agency R. at 4).

Plaintiff, however, never contested at the administrative level Commerce’s use of facts available. *See Final Results*, 64 Fed. Reg. at 43,653–59 (setting forth responses to comments received from Plaintiff and one other foreign producer, none of which challenged the use of facts available or the underlying conclusion that Plaintiff had “withheld information” and/or “significantly impeded” the investigation). In fact, Plaintiff in its comments to Commerce following the issuance of the preliminary results acknowledged that the use of facts available was justified. (*See* letter from Dunn to Daley of 3/30/99, at 16, Pl.’s App., Tab 1 (“[Plaintiff] recognizes that, inasmuch as it was unable (*not* unwilling) to supply information as to its cost, [Commerce] must use facts available to determine those costs.”).) Neither did Plaintiff previously raise any argument regarding notice.

Continued



transaction-specific dumping margin, calculated with the use of Plaintiff's own sales data and the cost data provided by the domestic producers in the cost allegation, as the facts available rate for Plaintiff. (*See* Compl. ¶ 7.)

The Government thus claims that Plaintiff failed to exhaust its administrative remedies (*see* Def.'s Mem. Opp'n to Mot. J. Agency R. at 18–19), and further notes, as does the Court, that Plaintiff has indeed conceded at various points in its papers that the use of facts available was warranted in light of the missing cost data. *See, e.g.*, Pl.'s Mem. Supp. Mot. J. Agency R. at 16–17 (“Admittedly, [Plaintiff] was unable to submit cost information and therefore [Commerce] had to use petitioners’ cost information * * *.”); Pl.’s Reply Mem. Supp. Mot. J. Agency R. at 6 (“The United States is correct that [Plaintiff] recognized that facts available were necessary to the extent that cost information was missing.”); *Id.* at 17 (“It is undisputed that there is a gap in the record that must be filled.”). Accordingly, the Court finds appropriate application of the exhaustion requirement. *See* 28 U.S.C. § 2637(d) (1994); *Fabrique de Fer de Charleroi S.A. v. United States*, 25 CIT ___, ___, n.1, 155 F. Supp. 2d 801, 805 n.1 (2001) (noting court’s discretion in application of exhaustion requirement and listing examples of exceptions fashioned thereto); *Pohang Iron & Steel Co. v. United States*, 23 CIT ___, ___, Slip Op. 99–112, at 36 (October 20, 1999) (“The court generally takes a strict view of the need to exhaust remedies by raising all arguments.”); *cf. Heveafil Sdn. Bhd. v. United States*, 25 CIT ___, ___, n.2, Slip Op. 01–22, at 9 n.2 (Feb. 27, 2001) (rejecting plaintiff’s partial facts available argument on additional grounds of failure to exhaust administrative remedies).

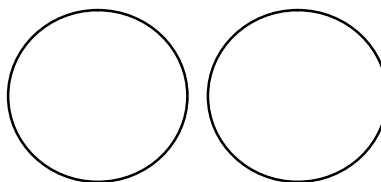
Even if the Court were to decline to apply the exhaustion doctrine, neither of Plaintiff’s arguments invalidates Commerce’s use of facts available. First, as to the propriety of Commerce’s invocation of facts available, Commerce explicitly stated its reasons for finding necessary the use of facts available, including its reasons for considering the missing cost information crucial to its investigation. *See Final Results*, 64 Fed. Reg. at 43,655 (finding that, because Plaintiff “failed to submit information which was not only specifically requested by [Commerce] but was also fundamental to the dumping analysis,” Plaintiff had “withheld information necessary to reach a determination and/or significantly impeded the investigation,” and further noting its reasons supporting subsidiary conclusion that such information was “vital”). Moreover, as Plaintiff itself concedes, Commerce was justified in its use of facts available by virtue of Plaintiff’s cost data not having been provided. Indeed, a party’s failure to provide requested information is sufficient grounds for the use of facts available. *See Mannesmannrohren-Werke*, 23 CIT at ___, ___, 77 F. Supp. 2d at 1315 (noting that failure to respond constitutes basis for use of facts available, and citing 19 U.S.C. § 1677e(a)(2)(A), (B)); Statement of Administrative Action (“SAA”) accompanying H.R. Rep. No. 103–826(I), at 869, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4198 (noting that section 1677e(a) “requires Commerce * * * to make determinations on the basis of facts available where requested information is missing from the record or cannot be used because, for example, it has not been provided * * * [and that the section] generally will require Commerce to reach a determination by filling gaps in the record due to deficient submissions or other causes”); *see also Ferro Union, Inc. v. United States*, 23 CIT ___, ___, n.44, 44 F. Supp. 2d 1310, 1330 & n.44 (1999) (noting that, while plaintiff’s failure to provide “full information” may have constituted grounds for use of facts available under 19 U.S.C. § 1677e(a)(2)(C), an additional finding was required prior to use of adverse inferences, and further noting that a conclusion that a party has impeded a review “does not have to be read negatively[, as a] respondent [can] impede a review without intending to do so”).

Second, with respect to its claim that Commerce failed to comply with 19 U.S.C. § 1677m(d), the evidence on the record, coupled with the provision’s legislative history, indicate that the requirements of section 1677m(d) were not triggered. This provision reads, in pertinent part, as follows:

If [Commerce] * * * determines that a response to a request for information under this subtitle does not comply with the request, [it] * * * shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle.

19 U.S.C. § 1677m(d) (emphasis added). The primary prerequisite to the provision of notice, then, is the submission of a “response to a request for information.” The SAA, which is “regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application,” 19 U.S.C. § 3512(d) (1994), construes section 1677m(d) as one requiring Commerce “to notify a party submitting deficient information of the deficiency, and to give the submitter an opportunity to remedy and explain the deficiency.” SAA at 865, 1994 U.S.C.C.A.N. at 4195. Thus, the phrase “a response to a request for information,” as set forth in section 1677m(d), means that the party replied in a responsive fashion, which responsive reply Commerce found to be in some respect deficient. *Cf. Borden, Inc. v. United States*, 22 CIT 233, 262, 4 F. Supp. 2d 1221, 1245 (1998) (“Subsection (d) thus requires that a party be given an opportunity to remedy or explain deficient submissions.”), *aff’d sub nom. Elli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027 (Fed. Cir. 2000), *rev’d on other grounds by Micron Tech., Inc. v. United States*, 243 F.3d 1301 (Fed. Cir. 2001). Here, Plaintiff submitted no information as to its costs, much less deficient information. Indeed, Plaintiff by its own letter of November 12, 1998, stated that it was “unable to respond” to Commerce’s request for such information. (*See* Letter from Dunn to Daley of 11/12/98, at 1, Pl.’s App., Tab 2.) Plaintiff further underscored its inability to respond to Commerce’s inquiry by neither completing nor returning to Commerce section D of the questionnaire.

In any event, Plaintiff had adequate notice of the information Commerce was seeking, and full knowledge that its reply was unresponsive. Commerce’s cost questionnaire provided Plaintiff with sufficient notice of the specific information it was required to submit. “This is not a case where [Commerce] failed to request the information.” *Kawasaki Steel Corp. v. United States*, 24 CIT ___, ___, 110 F. Supp. 2d 1029, 1035 (2000); *compare Allegheny Ludlum Corp. v. United States*, 24 CIT ___, ___, Slip Op. 00–170, at 30 (Dec. 28, 2000) (“Commerce has not ‘hidden the ball’ in its initial requests for information * * *”) with *Ta Chen I*, 23 CIT at ___, ___, Slip Op. 99–117, at 36–38 (finding that, where Commerce had failed to request information “specifically,” it had failed to provide plaintiff with sufficient notice under 19 U.S.C. § 1677m(d)). Moreover, Plaintiff’s letter of November 12, 1998, indicates that Plaintiff had knowledge that its reply was not responsive. As noted by Defendant-Intervenor (*see* Def.-Intervenor’s Mem. Opp’n to Mot. J. Agency R. at 13), Plaintiff therein effectively stated that it was aware of the nature of the information it was required to submit, that it had failed to do so, and that an opportunity to remedy or explain would have been futile, as “it [wa]s simply not possible for [it] to respond.” (Letter from Dunn to Daley of 11/12/98, at 2, Pl.’s App., Tab 2.) Thus, the facts here distinguish this case from those wherein a party submitted a responsive reply that was deficient in some respect, thereby obligating Commerce to advise such party of the nature of the deficiency.



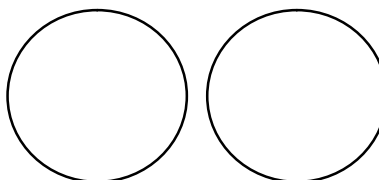
As to its first argument, Plaintiff maintains that it was “not in possession of information concerning its cost of production because it had sold [its frozen concentrated orange juice] facility, including all office functions and records, between the time [Commerce] sent out its initial questionnaire (which did *not* include a request for cost of production information) and the time that a cost of production investigation was first requested by petitioners.” (Pl.’s Mem. Supp. Mot. J. Agency R. at 3.) Plaintiff further claims that it “had no reason to expect that a cost of production investigation would be requested or initiated.” (*Id.* at 4.)

In support of its second argument, that, even if the use of adverse inferences were “somehow justifiable” (*id.*), Commerce’s use of “the highest rate found on any single sale was not a proper application of facts available” (*id.*), Plaintiff asserts two grounds. First, Plaintiff claims there exists no rational connection between the rate assessed and the evidence of record. (*Id.* at 4.) Specifically, Plaintiff complains that the 39.18 percent margin assessed in the final results was the “highest less-than-normal-value margin found on any sale made by [Plaintiff] to the United States” (*id.* at 2) and, further, that it had made at least one other such sale at a price not less than normal value. (*Id.* at 2-3.) This “disregard of evidence clearly and properly on the record concerning [its] complete sales” (*id.* at 3), Plaintiff insists, “violated 19 U.S.C. § 1677m, which prohibits [Commerce] from disregarding information properly on the record.” (*Id.*) Second, Plaintiff asserts that Commerce failed to exercise the application of adverse inferences with “special circumspection” (*id.* at 4) as, Plaintiff claims, is mandated by “Paragraph 7 of Annex II of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1994).” (*See id.*)

In response, the Government and Defendant-Intervenor claim that Commerce’s conclusion that Plaintiff failed to act to the best of its ability to comply with Commerce’s request for cost information, and its consequent resort to the use of adverse inferences drawn from facts otherwise available, are supported by substantial evidence on the record and are otherwise in accordance with law. (*See* Def.’s Mem. Opp’n to Mot. J. Agency R. at 12; Def.-Intervenor’s Mem. Opp’n to Mot. J. Agency R. at 13.) With respect to Commerce’s selection of Plaintiff’s facts available rate, the Government asserts that Commerce acted within its discretion, as it relied on data that was rationally related to the issue before it, and which also “provided an appropriate incentive to induce cooperation.” (Def.’s Mem. Opp’n to Mot. J. Agency R. at 13.)

STANDARD OF REVIEW

The court will hold unlawful “any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i); *see Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966) (“[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.”); *Inland Steel Indus., Inc. v.*



United States, 188 F.3d 1349, 1359 (Fed. Cir. 1999); *Hoogovens Staal, BV v. United States*, 24 CIT ___, ___, 86 F. Supp. 2d 1317, 1323 (2000) (“[I]n reviewing agency determinations the court declines to reweigh or reinterpret the evidence of record.”); see also *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (defining substantial evidence as “more than a mere scintilla,” or “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”).

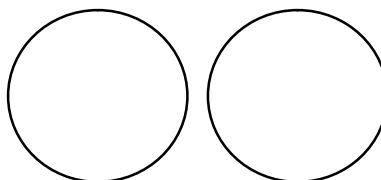
DISCUSSION

Two questions are presented here. First, whether Plaintiff’s failure to provide information over which it had control at the outset of the administrative review, but which it subsequently transferred to a third party despite prior notice that such information might be requested by Commerce at a later date in the proceeding, constitutes a “fail[ure] to cooperate by not acting to the best of [one’s] ability” within the meaning of 19 U.S.C. § 1677e(b), thereby warranting the application of adverse inferences. Second, whether Commerce’s selection of adverse inferences, namely, its selection of the highest transaction-specific dumping margin, calculated with the use of Plaintiff’s own sales data as well as industry-wide cost data available on the record, as Plaintiff’s facts available rate, is reasonable. The Court finds that Commerce’s application of adverse inferences is supported by substantial evidence on the record and is otherwise in accordance with law, and that Commerce’s selection of adverse inferences is in this case reasonable.

I. Commerce’s Application of Adverse Inferences

Once it has determined that the use of facts available is warranted under 19 U.S.C. § 1677e(a), Commerce may draw adverse inferences from such facts. See 19 U.S.C. § 1677e(b); *Kawasaki Steel Corp. v. United States*, 24 CIT ___, ___, 110 F. Supp. 2d 1029, 1034 (2000). Before so doing, however, Commerce must make the “additional finding,” *id.* at ___, 110 F. Supp. 2d at 1034, that a party has “failed to cooperate by not acting to the best of its ability to comply with a request for information.” 19 U.S.C. § 1677e(b); see *Ferro Union, Inc. v. United States*, 23 CIT ___, ___, 44 F. Supp. 2d 1310, 1329 (1999); *Borden, Inc. v. United States*, 22 CIT 233, 264, 4 F. Supp. 2d 1221, 1246 (1998), *aff’d sub nom. Elli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027 (Fed. Cir. 2000), *rev’d on other grounds by Micron Tech., Inc. v. United States*, 243 F.3d 1301 (Fed. Cir. 2001). A “mere recitation of the relevant standard is not enough.” *Ferro Union*, 23 CIT at ___, 44 F. Supp. 2d at 1330. Commerce must: (1) state its reasons for finding that the party failed to act to the best of its ability; and (2) explain why the absence of the requested information is important to the investigation. *Nippon Steel Corp. v. United States*, 24 CIT ___, ___, 118 F. Supp. 2d 1366, 1378 (2000) (“*Nippon Steel I*”).

Commerce may not, of course, resort to the use of adverse inferences where a party fails to produce information that never existed. *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1572 (Fed. Cir. 1990). The statute “clearly requires noncompliance with an information re-



quest before resort to [adverse inferences] is justified, whether due to refusal or mere inability.” *Id.* at 1574; see also *Nippon Steel I*, 24 CIT at ___, 118 F. Supp. 2d at 1378 (discussing “best ability to comply” standard). Thus, in cases where, as here, a party alleges that it is unable to comply with a request for information,

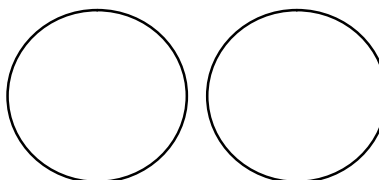
Commerce must find that [such party] could comply, or would have had the capability of complying if it knowingly did not place itself in a condition where it could not comply. Commerce must also find either a willful decision not to comply or behavior below the standard for a reasonable respondent.

Nippon Steel I, 24 CIT at ___, 118 F. Supp. 2d at 1378–79 (internal citation omitted); accord *Steel Auth. of India, Ltd. v. United States*, 25 CIT ___, ___, 149 F. Supp. 2d 921, 930 (2001). In addition, Commerce may, in the context of an administrative review, consider a party’s past behavior. *Gourmet Equip. (Taiwan) Corp. v. United States*, 24 CIT ___, ___, Slip. Op. 00–78, at 16 (July 6, 2000) (“Past participation may be relevant to notice, knowledge and reliance issues.”); accord *Heveafil Sdn. Bhd. v. United States*, 25 CIT ___, ___, Slip Op. 01–22, at 11 (Feb. 27, 2001). Finally, “Commerce is to consider the extent to which a party may benefit from its own lack of cooperation.” *Gourmet Equip.*, 24 CIT at ___, Slip. Op. 00–78, at 14 (citing Statement of Administrative Action (“SAA”) accompanying H.R. Rep. No. 103–826(I), at 870, reprinted in 1994 U.S.C.C.A.N. 4040, 4199).

Upon reference to the statute, the relevant case law, and the record, the Court finds that Commerce properly resorted to the application of adverse inferences drawn from facts otherwise available. First, it is undisputed that the necessary cost information does, or did, in fact exist. *Compare Olympic Adhesives*, 899 F.2d at 1573. Second, Commerce made the requisite “additional finding” under section 1677e(b) with respect to Plaintiff’s failure to cooperate, stating:

We have determined that [Plaintiff] did not act to the best of [its] ability in this proceeding * * * because we find that the failure to provide the information requested was not beyond [its] control.
* * *

[Plaintiff] possessed the information necessary to complete the review at the time that the review was initiated. At initiation, the information was within [its] control. Although [Plaintiff] subsequently maintained control of the sales data only, there is no evidence to indicate that it was outside [its] ability to maintain control over the data necessary to respond to the cost questionnaire. As with its sales data, [Plaintiff] could have made an adequate provision to retain this cost data. Not only was [Plaintiff] aware that the possibility of a cost investigation existed (in light of its participation in cost investigations in previous segments of this proceeding), but it should have been aware that such an investigation was likely, given that the information used in the cost allegation was public information based on Brazilian industry data.



Furthermore, although [Plaintiff's] factual circumstances changed during the course of the review, this does not relieve [Plaintiff] of the obligation to attempt to comply, to the best of its ability, with the request for information. In this case, [Plaintiff] provided no evidence that it attempted to obtain the cost information necessary to complete the review. Finally, we note that section 782(c) of the Act affords interested parties the opportunity to notify [Commerce] when they are unable to submit the information requested, and requires them to provide suggested alternatives for submitting the information. Although [Plaintiff] notified [Commerce] of its purported inability to submit the information, it provided no suggestions for submitting alternative information. Consequently, we find that [Plaintiff] did not act to the best of its ability in this proceeding.

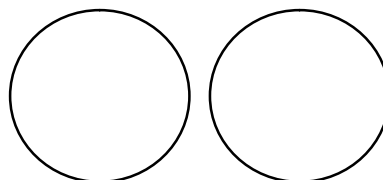
Final Results, 64 Fed. Reg. at 43,655–56 (internal citations omitted). Commerce also explained why the missing cost data was “fundamental” to the investigation. *See id.* at 43,655.

Third, the record contains a reasonable showing in support of each of the grounds cited by Commerce as the basis for its conclusion that Plaintiff's failure to cooperate was not beyond its control. *See Nippon Steel Corp. v. United States*, 25 CIT ___, ___, 146 F. Supp. 2d 835, 841 (2001) (“In cases where a respondent claims an *inability* to comply with the agency's requests for information, [Commerce] may permissibly draw an adverse inference upon a reasonable showing that the respondent, in fact, could have complied.”) (“*Nippon Steel II*”). For instance, the record shows that Plaintiff possessed the requested cost data, as it did the requested sales data. (*See, e.g.*, letter from Dunn to Daley of 11/12/98, at 2, Pl.'s App., Tab 2; Pl.'s Mem Supp. Mot. J. Agency R. at 24.) The record also contains representations by Plaintiff that further demonstrate that it “would have had the capability of complying if it knowingly did not place itself in a condition where it could not comply.” *Nippon Steel I*, 24 CIT at ___, 118 F. Supp. 2d. at 1378–79. According to Plaintiff:

[o]n July 1, 1998, [it] sold its entire [frozen concentrated orange juice] operation, transferring the factory, administrative offices and all records as part of this sale. While [it] retained pricing information because of the administrative review that had been requested, [it] did not anticipate the initiation of a cost investigation and therefore did not retain any cost information. Thus, [it] did not have in its possession any of the cost information requested by [Commerce] and was unable to obtain it.

(Pl.'s Mem. Supp. Mot. J. Agency R. at 9 (quoting letter from Dunn to Daley of 11/12/98, at 1–2, Pl.'s App., Tab 2).) Notably, the record does not contain any representation that Plaintiff's failure to “retain” its cost data was beyond its control. Commerce's conclusion, then, that Plaintiff could have retained its cost data, is reasonable in light of the statements on the record and Plaintiff's retention of its price data.

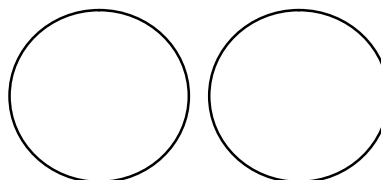
The record also demonstrates that Plaintiff was both: (1) actually alerted to the prospect that it might be required to submit cost data; and (2) sufficiently experienced with Commerce's procedures, such that,



even without actual notice, it should have known that cost data might be required. In other words, Plaintiff's "behavior [fell] below the standard for a reasonable respondent." *Nippon Steel I*, 24 CIT at ___, 118 F. Supp. 2d at 1379. At the outset of the administrative review, Plaintiff was unambiguously and explicitly advised by Commerce that cost of production data might be required at a later date. In addition, Plaintiff participated in two previous reviews where such information was, in fact, requested. Indeed, Plaintiff took part in six administrative reviews prior to the review contested herein. (See Pl.'s Mem. Supp. Mot. J. Agency R. at 5.) Plaintiff was not, then, unfamiliar with these proceedings, and was well aware of the kinds of information it might be required to submit. Hence, Plaintiff cannot be said to have had no "real indication that [Commerce] would conduct such an investigation." (*Id.* at 7.) Here, a reasonable respondent would have retained its cost data. Cf. *Heveafil* 25 CIT at ___, Slip Op. 01-22, at 11-12 (finding that evidence supported Commerce's conclusion that plaintiff, in context of verification, had failed to cooperate, where plaintiff destroyed certain "source documents" despite having previously been informed that Commerce wished to review such documents and, in light of such notice and its past participation in verifications, knew or should have known to maintain such documents); *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 24 CIT ___, ___, Slip Op. 00-107, at 8 (Aug. 25, 2000) ("*Ta Chen II*").

Finally, Plaintiff fails to point to any evidence of any attempt on its part to provide Commerce with its cost information, much less that it acted to the best of its ability to do so. Nor does Plaintiff allege that it made any effort to obtain the requested data. In sum, the record does not show that Plaintiff was unable to obtain the requested cost information but, perhaps, only that it did not at the time of Commerce's request readily possess such information. Similarly, Plaintiff made no attempt during the administrative proceedings to provide Commerce with alternative information that it now, belatedly, claims might have been "usable" (Pl.'s Mem. Supp. Mot. J. Agency R. at 32), if only it had been "give[n] * * * an opportunity to suggest it." (*Id.*) Such behavior, again, falls "below the standard for a reasonable respondent." *Nippon Steel I*, 24 CIT at ___, 118 F. Supp. 2d at 1379; see, e.g., *Kawasaki Steel*, 24 CIT at ___, 110 F. Supp. 2d at 1036 (noting that plaintiff, "a sophisticated and continuing player in the market, never suggested alternatives, never requested help from Commerce, and provided an unconvincing account of why it could not comply fully"); see also 19 U.S.C. § 1677m(c)(1).

Thus, the Court finds the grounds cited by Commerce in support of its determination that Plaintiff had failed to act to the best of its ability to comply with Commerce's request for information, and, hence, its decision to apply adverse inferences, supported by substantial evidence on the record and otherwise in accordance with law.



II. Commerce's Selection of Adverse Inferences

Commerce is authorized to draw adverse inferences, where permitted, on the basis of secondary information⁶ or on any other information placed on the record. *See* 19 U.S.C. § 1677e(b)(1)–(4); 19 C.F.R. § 351.308(c) (1998). “In the case of uncooperative respondents, the discretion granted by the statute appears to be particularly great.” *Ellis De Cecco*, 216 F.3d at 1032; *see also Heveafil*, 25 CIT at ___, Slip Op. 01–22, at 13 (“Once it determines that it is appropriate to assign adverse facts available, Commerce has discretion in choosing a specific dumping margin.”). However, a rational relationship must exist between the facts chosen and the matter to which they are applied. *Ta Chen II*, 24 CIT at ___, n.6, Slip Op. 00–107, at 20 n.6.

As previously noted, Commerce relied on the following record data: (1) cost of production information supplied by the domestic manufacturers in the cost allegation; and (2) sales data provided by Plaintiff. *Final Results*, 64 Fed. Reg. at 43,657. Thus, Commerce used data on which it was, by statute, permitted to rely when drawing an adverse inference. *See* 19 U.S.C. § 1677e(b)(4); *see also NSK, Ltd. v. United States*, 25 CIT ___, ___, Slip Op. 01–69, at 76 (June 6, 2001) (finding that, because Commerce drew adverse inference from information on which it was permitted to rely, selection of respondent's rate was reasonable and in accordance with law).

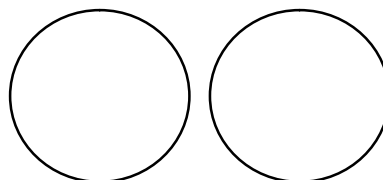
Furthermore, there exists a rational relationship between the facts chosen—data on the record relating to the costs associated with the production of frozen concentrated orange juice in Brazil, together with Plaintiff's own sales data—and the matter to which they were applied—the calculation of Plaintiff's sales-specific dumping margins. *Cf. Man-*

⁶Secondary information is “information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.” SAA at 870, 1994 U.S.C.C.A.N. at 4199. “When [Commerce] relies on secondary information rather than on information obtained in the course of an investigation or review, [it] shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal.” 19 U.S.C. § 1677e(c). This so-called corroboration requirement was enacted as part of the URAA, in order to implement a provision of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (“GATT”) 1994 requiring the exercise of “special circumspection” with respect to the use of secondary information. *See* Agreement on Implementation of Article VI of GATT 1994, Annex II, ¶ 7, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, Annex 1A, *Uruguay Round of Multilateral Trade Negotiations GATT* 168–69 (Office of the U.S. Trade Representative 1994); *see also Ferro Union*, 23 CIT at ___, 44 F. Supp. 2d at 1333; *World Finer Foods, Inc. v. United States*, 24 CIT ___, ___, Slip Op. 00–72, at 15 (June 26, 2000); *see, e.g., Borden*, 4 F. Supp. 2d at 1247 (concluding that corroboration was required, as secondary information upon which Commerce relied had been “called into question”).

Plaintiff has not raised a corroboration claim *per se*. Plaintiff argues instead:

“Circumspection” is defined as “cautious observation of circumstances” and “taking everything into account.” *** [Commerce] clearly did not take everything into account in this case when it applied a punitive adverse facts available margin. It ignored most of the information on [Plaintiff's] U.S. sales in favor of using the single highest dumping margin found. This does not constitute special circumspection under the Antidumping Agreement.

(Pl.'s Reply Mem. Supp. Mot. J. Agency R. at 11; *see also* Pl.'s Mem. Supp. Mot. J. Agency R. at 35–36.) Plaintiff's interpretation is, however, misguided, as the provision relates to corroboration of secondary information, when “called into question.” *Borden*, 4 F. Supp. 2d at 1247. Here, Plaintiff has not questioned the accuracy of the industry-wide cost data submitted by the domestic producers. (*See, e.g.,* letter from Dunn to Daley of 9/24/98, at 4, Pl.'s App., Tab 3 (“Fortunately, [Defendant-Intervenor] has submitted public data on the record that may permit the calculation of a real cost of production for [frozen concentrated orange juice] marketed in 1997–98.”).) Even assuming, *arguendo*, that Plaintiff's construction has some merit, there is nothing to suggest that Commerce did not “take into account” all of the information regarding Plaintiff's U.S. sales. Indeed, Commerce used all such data to calculate transaction-specific dumping margins. In any event, the information upon which Commerce drew adverse inferences was that which was otherwise available to it and which was obtained in the course of the review, namely, the cost data submitted by the domestic producers, as well as Plaintiff's own sales data. Furthermore, while Commerce did not rely on any information other than that obtained in the course of the review, it nonetheless noted that the cost information upon which it relied was contemporaneous with the period of review, specific to Brazil, and representative of all of Plaintiff's products. *See Final Results*, 64 Fed. Reg. at 43,652; *see also id.* at 43,657 n.4.



nesmannrohren-Werke, 23 CIT at ___, 77 F. Supp. 2d at 1319 (finding that a “close nexus” and, hence, rational relationship, existed “between the data chosen and the matter to which it applie[d] since, essentially, Commerce did no more than use available record evidence of a market price to help it approximate other market prices”).

Moreover, use of the highest calculated transaction-specific dumping margin as Plaintiff’s facts available rate furthers the underlying purpose of using an adverse inference, i.e., to “ensure that [a] party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” SAA at 870, 1994 U.S.C.C.A.N. at 4199; *Mannesmannrohren-Werke*, 23 CIT at ___ n.7, 77 F. Supp. 2d at 1319 n.7; *cf. NSK Ltd.*, 25 CIT at ___, Slip Op. 01–69, at 76 (upholding as reasonable Commerce’s selection of highest calculated margin as adverse facts available rate so that plaintiff “would not benefit from its lack of cooperation and so that [plaintiff] would have an incentive to cooperate in future reviews”). Indeed, Commerce noted that it had declined to follow its normal practice of using the highest margin from the current or any prior segment of the proceeding, as this would have led to the application of a dumping margin that was, according to Commerce, “much lower than [the] margin[] actually calculated based on information submitted by [Plaintiff] in this segment of the proceeding,” *Final Results*, 64 Fed. Reg. at 43,651, and which would, therefore, have allowed Plaintiff to benefit from its lack of cooperation. *See id.*

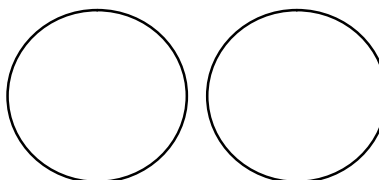
As to Commerce’s alleged disregard of Plaintiff’s other sales data, which, Plaintiff argues, Commerce should have used to calculate a weighted-average dumping margin rather than relying on the single highest transaction-specific dumping margin selected, the Court is not convinced that Commerce’s decision was unreasonable. Plaintiff cites no authority indicating that Commerce is mandated to use such an approach.⁷ Indeed, the selection of particular adverse facts is a matter largely within Commerce’s discretion. *See Flli De Cecco*, 216 F.3d at 1032 (“Commerce is in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that

⁷ Plaintiff does, however, cite to section 1677m(e). This section provides that Commerce “shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements,” 19 U.S.C. § 1677m(e), where each of the following five requirements have been met:

- (1) the information is submitted by the deadline established for submission,
- (2) the information can be verified,
- (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
- (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] with respect to the information, and
- (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e). The SAA further indicates that the directive set forth in section 1677m(e) applies to submissions which are “deficient” but otherwise fulfill the five-part test set forth therein. *See* SAA at 865, 1994 U.S.C.C.A.N. at 4195 (“New section 782(e) directs Commerce * * * to consider deficient submissions if the following conditions are met * * *”); *see also Borden*, 4 F. Supp. 2d at 1245–46.

Thus, section 1677m(e) is, on its face, inapplicable in situations where, as here, a party has failed to “demonstrate[] that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] with respect to the information.” 19 U.S.C. § 1677m(e)(4). Regardless of whether Plaintiff acted to the best of its ability in supplying its price data, it did not act to the best of its ability in providing its cost of production data. In any event, there is nothing to suggest that Commerce did not consider all of Plaintiff’s sales data when selecting, from among the transaction-specific dumping margins calculated in part with the use of such data, the highest such margin as Plaintiff’s facts available rate—a decision constituting an adverse inference. Plaintiff’s interpretation of section 1677m(e) would tend to eliminate the deterrent value of using an adverse inference.

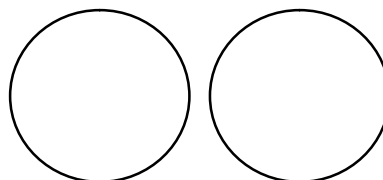


will create the proper deterrent to noncooperation with its investigations and assure a reasonable margin.”). While the selection of a party’s highest transaction-specific dumping margin as its facts available rate may not in every case be reasonable, *see, e.g., NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (underscoring Commerce’s duty to calculate dumping margins “as accurately as possible”) (“*NTN II*”), here, Commerce explained that the application of a weighted-average dumping margin “potentially would allow [Plaintiff] to benefit,” *Final Results*, 64 Fed. Reg. at 43,657, as the reported costs otherwise available “are based on average data from the Brazilian [frozen concentrated orange juice] industry, which is comprised of both high- and low-cost producers,” *id.*, and are, thus, “likely * * * understated.” *Id.* Finally, although Commerce’s selection of the highest transaction-specific dumping margin may have resulted in a higher rate than that which would have been assessed had Commerce used a weighted-average dumping margin incorporating all of Plaintiff’s sales data, this does not render Commerce’s methodology “lacking in rationality.” *Mannesmannrohren-Werke*, 23 CIT at ___, 77 F. Supp. 2d at 1319.

Thus, the Court concludes that Commerce’s selection of adverse inferences, namely, its selection of Plaintiff’s highest transaction-specific dumping margin as Plaintiff’s facts available rate, is reasonable.

CONCLUSION

For the reasons set forth above, the Court concludes that Commerce’s application of adverse inferences drawn from the facts otherwise available is supported by substantial evidence on the record and is otherwise in accordance with law, and that Commerce’s selection of adverse inferences is in this particular case reasonable. Thus, the Court upholds Commerce’s final determination. Judgment is entered accordingly.



(Slip Op. 01-122)

NIPPON STEEL CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND
BETHLEHEM STEEL CORP., U.S. STEEL GROUP, A UNIT OF USX CORP., ISPAT
INLAND INC., LTV STEEL CO., INC., GALLATIN STEEL, IPSCO STEEL, INC.,
STEEL DYNAMICS, INC., AND WEIRTON STEEL CORP., DEFENDANT-
INTERVENORS

BETHLEHEM STEEL CORP., U.S. STEEL GROUP, A UNIT OF USX CORP., ISPAT
INLAND INC., AND LTV STEEL CO., INC., PLAINTIFFS *v.* UNITED STATES,
DEFENDANT, AND NIPPON STEEL CORP., DEFENDANT-INTERVENOR

Consolidated Court No. 99-08-00466

[ITA Second Remand Determination Remanded.]

(Dated October 12, 2001)

Gibson, Dunn & Crutcher LLP (Daniel J. Plaine, Gracia M. Berg, Merritt R. Blakeslee,
and Seth M. M. Stodder) for plaintiff Nippon Steel Corporation.

Skadden, Arps, Slate, Meagher & Flom LLP (Robert E. Lighthizer and John J. Mangan)
for plaintiffs Bethlehem Steel Corporation, U.S. Steel Group, a unit of USX Corporation,
Ispat Inland, Inc. and LTV Steel Company, Inc.

Robert D. McCallum, Assistant Attorney General, *David M. Cohen*, Director, Commer-
cial Litigation Branch, Civil Division, United States Department of Justice (*Kyle*
Chadwick), *John D. McInerney*, *Elizabeth C. Seastrum*, and *Linda S. Chang*, Office of the
Chief Counsel for Import Administration, United States Department of Commerce, of
counsel, for defendant.

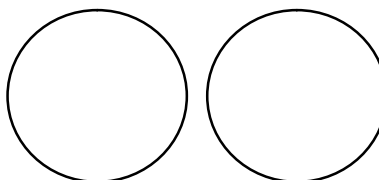
OPINION

Restani, *Judge*: Nippon Steel Corporation (“Nippon”) challenges the second remand determination by the United States Department of Commerce (“Department” or “Commerce”) in *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 64 Fed. Reg. 24,329 (Dep’t Comm. 1999) (final determ.) [“*Final Results*”]. Nippon contests what it characterizes as a change in the Department’s methodology upon remand as well as the Department’s selection of neutral facts available in arriving at a revised dumping margin.¹ Commerce and Defendant-intervenors, Bethlehem Steel Corporation, U.S. Steel Group, a unit of USX Corporation, Ispat Inland, Inc., and LTV Steel Company, Inc., reject Nippon’s characterization of the Department’s actions upon remand as a change in methodology and insist on the reasonableness of the agency’s selection of neutral facts available. Familiarity with the opinions ordering remand is presumed. *See Nippon Steel Corp. v. United States*, 146 F. Supp. 2d 835 (Ct. Int’l Trade 2001) (“*Nippon II*”); *Nippon Steel Corp. v. United States*, 118 F. Supp. 2d 1366 (Ct. Int’l Trade 2000) (“*Nippon I*”).

I. Change in Methodology

Nippon alleges that the Department’s remand analysis constitutes a change in its methodology from that applied in the *Final Results*. Nip-

¹ Nippon’s separate motion to reconsider this court’s earlier remand decision denying Nippon’s request to invalidate the investigation is denied.



pon claims that the Department's use of weighted averages and product-specific (otherwise described as CONNUM-specific) margins was a shift in methodology that inflated Nippon's dumping margin. Nippon also claims that Commerce's calculation of a margin for each of Nippon's products that had exclusively theoretical weight sales (in addition to margins for those products that had both actual and theoretical weight sales) was an unexplained departure from the original methodology.²

Commerce has not improperly changed its methodology because there has been no methodological change that necessitates further explanation here. In stark contrast to the cases relied upon by Nippon, *see, e.g., Shikoku Chems. Corp. v. United States*, 16 CIT 382, 388, 795 F. Supp. 417, 422 (1992); *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988); *Calcium Hypochlorite from Japan*, 55 Fed. Reg. 41,259, 41,260 (Dep't Comm. 1990) (final admin. rev.), the changes undertaken by Commerce here were necessitated by this court's directive to calculate a dumping margin for Nippon without an adverse inference. *See Nippon II*, 146 F. Supp. 2d at 844-45. When a court remands a determination after finding that Commerce has relied on adverse facts available where the evidence cannot support an adverse inference, Commerce must re-calculate a margin by replacing those steps in the original calculation that were designed to be punitive with measures that are designed to be neutral. *See* Statement of Administrative Action, accompanying H.R. Rep. No. 103-826(I), at 869, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4198 ("SAA") ("[19 U.S.C. § 1677e(a)] generally will require Commerce to reach a determination by filling gaps in the record due to deficient submissions or other causes * * *. [T]he facts available are information or inferences which are reasonable to use under the circumstances."). In other words, Commerce follows the same steps in its calculation on remand that it would if the agency were undertaking the calculation for the first time in the original investigation or administrative review with complete information, except that the agency may employ non-adverse facts available to fill informational gaps.

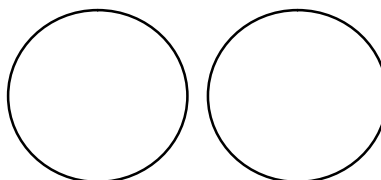
Had the Department been provided properly with the necessary weight conversion factor during the investigation, it would have converted the theoretical weight sales into actual weight sales and subsequently calculated a weighted average margin for each CONNUM. *See* Department of Commerce, Antidumping Manual ch. 7 at 28 (1998).³ In doing so, margins would be calculated separately for each "mixed"

²Nippon contests the Department's separate margin calculation for each the [] products that only had theoretical weight sales, in addition to the separate margin calculation for each of the [] products with both theoretical and actual weight sales.

³The Department states the following in its Antidumping Manual:

Because the normal method of comparison in an investigation is weighted-average EP or CEP to weighted average NV, the boundaries of the averaging groups are extremely important. We do not simply calculate one weighted-average price for all products within the scope of the investigation to determine EP, CEP, or NV. While easy to do a comparison of such averages, it would be meaningless. The items within the averaging groups should share as many common characteristics as feasible. For example, we nearly always calculate model-specific weighted-average prices * * *. Calculation of these "narrower" weighted-average prices yields more accurate results than broad averages which mix sales with different characteristics which affect prices * * *.

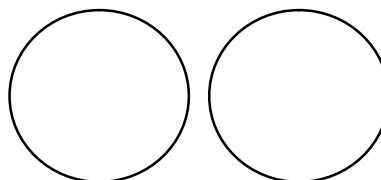
Antidumping Manual, at ch. 7, 28.



CONNUM, i.e., those product groups with actual and theoretical weight sales, as well as for each “pure” CONNUM, i.e., those product groups with only theoretical weight sales. The fact that one set of CONNUMs contained only theoretical weight sales would not preclude that set of CONNUMs from being given a margin with the available data. Because there was no weight conversion factor on record, however, Commerce focused on “mixed” CONNUMs, with both theoretical and actual weight sales, in the Final Results. Taking the highest sale-specific margin for each of these CONNUMs, based on the actual weight sales, the Department then took a simple average of these margins, which result became the margin applied to all of Nippon’s theoretical weight sales. *See Final Results*, 64 Fed. Reg. at 24,362; *see also Second Remand Analysis Memo* (June 18, 2001), at 1, R.C.R. Doc. 3, DOC Response Br., Tab 5, at 1. Nippon’s overall dumping margin as a result of this calculation was 19.65%. *See Final Results*, 64 Fed. Reg. at 24,370.

In responding to the court’s concerns expressed in the previous decisions in this case, Commerce sought on the second remand to derive a new, non-adverse dumping margin for Nippon by performing the following steps: (1) for each “mixed” CONNUM, which had both actual and theoretical weight sales, the Department calculated a weighted-average margin based on the actual weight sales (for which sufficient data existed on the record); (2) this real margin for the actual weight sales in each of these mixed CONNUMs became the facts available margin for the theoretical weight sales in the same CONNUM; and (3) for the remaining “pure” CONNUMs, which had exclusively theoretical weight sales, the Department calculated a weighted average margin of all the actual weight margins calculated in step (1) for the mixed CONNUMs. *See Second Remand Analysis Memo*, at 1, DOC Response Br., Tab 5, at 1. These steps resulted in a revised overall dumping margin for Nippon of 18.39%. *See id.*

The aspects of the calculation that have changed since the final determination and about which Nippon now complains are precisely those elements that together rendered the final determination an application of *adverse* facts available. By using simple averages and indiscriminately applying a single margin for all theoretical sales regardless of specific CONNUM, Commerce sacrificed a certain amount of accuracy in the Final Results in order to “ensure that [Nippon] does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” SAA, at 870. It may be possible that purposeful reliance on simple averages instead of weighted averages and the selection of a generally applicable margin that is not CONNUM-specific is appropriate to further the purposes of the adverse facts available provision of the statute. *Cf. Com-itex Knitters, Ltd. v. United States*, 16 CIT 817, 821–22, 803 F. Supp. 410, 414–16 (1992) (upholding Commerce’s reliance on simple averages in BIA methodology over respondent’s objections to use more accurate weighted averages). Actions and calculations that are appropriate in the context of an adverse inference, however, may not necessarily be ap-

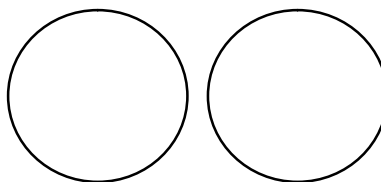


propriate when calculating a margin using neutral facts available. Nippon seeks to have this court *mandate*, in a neutral facts available context, a methodology that the court may not even be able to *permit* in such a context. See *Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1096 (Ct. Int'l Trade 2001) (rejecting Commerce's unreasoned reliance on simple average in lieu of more accurate weighted average in non-adverse facts available context). Commerce, by ensuring that margins were based on weighted averages and were CONNUM-specific, performed its calculations here according to the standards of reasonableness which must guide the agency in the application of neutral facts available. The court rejects Nippon's attempt to bind the Department to methodologies which would only be acceptable if no longer existing adverse inferences existed.

II. Selection of Non-Adverse Facts Available

Nippon further argues that the Department erred in its selection of non-adverse facts to be relied upon in lieu of the missing weight conversion factor data. As an initial matter, Nippon argues that the Department is permitted to use only those "facts" that replace the specific information that is missing from the record in order for the Department to perform its margin calculations. The specific information that Nippon failed to provide in a timely manner is the weight conversion factor that is necessary to translate the theoretical weight sales made by Nippon into an actual weight basis. Commerce did not insert a substitute weight conversion factor into its calculations. Instead, the Department created substitute margins based on other evidence in the record. Nippon insists that Commerce, in failing to identify other evidence that might produce a stand-in weight conversion factor, exceeded its authority under the facts available provision of the statute.

Nippon's reading of the statute and the SAA is unduly restrictive in the limitations it places upon the agency's discretion to employ non-adverse facts available. Neither the statute nor the SAA mandate that the facts selected by the agency directly "take the place of the missing or otherwise unacceptable fact." Nippon Br., at 15. The SAA instructs the Department not simply to replace the missing facts, but to make "determinations on the basis of the facts available." SAA, at 869. The SAA further grants the Department a degree of flexibility to "weigh[] the record evidence to determine that which is most probative of the issue under consideration," and it identifies "facts available" as "information or inferences which are reasonable to use under the circumstances." *Id.* Commerce may thus employ record evidence to arrive at a margin calculation in the absence of complete data, even if the evidence does not necessarily replace the precise data missing, subject to the constraint that the facts and the manner in which they are employed are reasonable. See *Koenig & Bauer-Albert AG v. United States*, 15 F. Supp. 2d 834, 846 (Ct. Int'l Trade 1998), *aff'd in part, vacated in part on other grounds*, 259 F.3d 1341 (Fed. Cir. 2001).



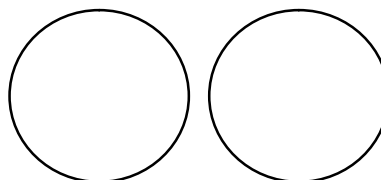
It does not follow from the statutory discretion to use substitute margins instead of a replacement weight conversion factor; however, that the use of the specific margins in this case was proper. As Nippon points out, the margins derived by the Department in its remand calculations could only have resulted from data that yields a weight conversion factor that seems unreasonable on its face. Because the weight conversion factor is intended to reflect the ratio of the actual weights upon delivery to the theoretical weights at which products are sold, one may not realistically expect a direct one-to-one ratio, but one would expect that the actual weights are not dramatically greater than the theoretical weights. Particularly as steel customers often pay for these products on the basis of theoretical weight rather than actual weight, a firm will seek to prevent a weight conversion factor of much greater than 1.0. For the margins to be what the Department's calculation has suggested, however, Nippon must have delivered in actual weight multiple times what it sold in theoretical weight.⁴ The non-adverse facts relied upon by the Department under such circumstances, therefore, cannot be said to bear "a rational relationship between data chosen and the matter to which they are to apply." *Koenig & Bauer*, 15 F. Supp. 2d at 846 (quoting *Manifattura Emmempi v. United States*, 16 CIT 619, 624, 799 F. Supp. 110, 115 (1992)).⁵

Finally, Nippon suggests that the Department use weight conversion data provided by another respondent in this review, Kawasaki Steel Corporation, notwithstanding the Department's stated concerns of improperly revealing business proprietary information by doing so.⁶ Nippon's reliance on various determinations in which Commerce employed data from certain respondents to calculate a margin for another respondent

⁴ It appears that the implicit weight conversion factor behind the Department's remand margins is [], suggesting that Nippon delivered to each U.S. customer approximately []%, or [] times, as much steel as the customer had actually bought. Nippon Br., at 16 n.6.

⁵ In briefing before this court, neither Commerce nor Defendant-intervenors even attempts to respond to Nippon's arguments or otherwise rationalize the use of data that upon deconstruction reveals this grossly inflated conversion factor. Although Nippon had raised this precise concern at the agency level, the Department stated at oral argument that it had undertaken no further analysis to determine whether Nippon's []% figure was accurate. Instead, the agency argues that its facially neutral methodology, discussed *supra* at Part I, is sufficient to render its remand determination a proper application of non-adverse facts available, notwithstanding the possibility that the facially neutral methodology rests on an implicit weight conversion factor of []. The Department is incorrect. When applying non-adverse facts available, if the Department chooses to adopt a methodology to complete its margin calculation, instead of directly replacing the missing information, such methodology must be reasonable. See *Mitsubishi Heavy Indus. v. United States*, 54 F. Supp. 2d 1183, 1186-87 (Ct. Int'l Trade 1999) (upholding neutral facts available methodology because "reasonable"). Where the purportedly neutral methodology results in a figure that could have been produced under ordinary circumstances (i.e., where the Department simply replaces the missing information) only by substituting *incredible* data for the respondent's missing information, the application of the methodology is unreasonable, and therefore, impermissible. Cf. *D & L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997) ("Information that has conclusively been determined to be inaccurate does not qualify as the 'best information' under any test, and certainly cannot be said to serve the 'basic purpose' of promoting accuracy."); *Borlen S.A.—Empredimentos Industriais v. United States*, 913 F.2d 933, 937 (Fed. Cir. 1990) ("Congress' desire for speedy determinations on dumping matters should not be interpreted as authorizing proceedings that are based on inaccurate data."). In advance of oral argument, the court specifically asked the parties to address how this methodology might be reasonable despite the []% figure. No acceptable explanation was proffered. The court deems it futile to ask for Defendant again to attempt to justify its methodology.

⁶ Nippon also urges the Department to use the company's actual weight conversion factor data, untimely submitted and therefore rejected by Commerce pursuant to 19 C.F.R. § 351.104 (2001). At oral argument, Commerce claimed it did not use Nippon's data because the agency believed, erroneously, that the regulation rendered the submitted data unavailable for consideration. Although the Department understandably seeks to enforce its time limits for submissions, as the court noted in *Nippon II*, 146 F. Supp. 2d at 840 n.6, "Commerce remains free to use NSC's data or other non-adverse data." Although the rejected data was not verified, verification is only a spot check, and Nippon's other data did not fail verification. Depending on necessity, it is Commerce's decision whether to use this data.

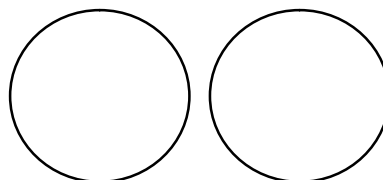


is misplaced. Those determinations either involved weight averaged data from multiple respondents that does not risk the derivation of proprietary information, *Fresh Atlantic Salmon from Chile*, 66 Fed. Reg. 18,431, 18,436–37 (Dep’t Comm. 2001) (prelim. admin. rev.), or did not clearly use proprietary information, *Certain Fresh Cut Flowers from Colombia*, 52 Fed. Reg. 6842, 6845 (Dep’t Comm. 1987) (final determ.). Cf. *Shop Towels from Bangladesh*, 61 Fed. Reg. 55,957, 55,964 (Dep’t Comm. 1996) (final admin. rev.) (“[W]e are using proprietary data from four respondents, which adequately protects each respondent’s proprietary data.”). As Nippon conceded at oral argument, if the Department were to rely on Kawasaki’s weight conversion data, Nippon would be able to derive that proprietary information in the same manner that Nippon was able to calculate the implicit weight conversion factor discussed *supra*. Commerce, therefore, properly refused to rely on Kawasaki’s proprietary weight conversion data where such use may reveal proprietary information to Nippon. See *Geum Poong Corp. v. United States*, No. 00–06–00298, slip op. 01–115, at 6–7 (Ct. Int’l Trade Sept. 6, 2001).⁷

CONCLUSION

The Department is not prohibited from altering the original adverse inference methodology in order to ensure the use of neutral facts available when re-calculating Nippon’s dumping margin. Nevertheless, the Department unreasonably selected weighted average margins for theoretical weight sales as non-adverse facts available, where those margins reflected a weight conversion factor that is clearly implausible. On remand, the agency shall devise a new approach to the determination of neutral facts available. Remand results are due within thirty (30) days hereof. Objections may be filed eleven (11) days later.

⁷This does not mean that Commerce may not use Kawasaki’s data as one check on the reasonableness of its methodology, or use it in some other generalized manner.



(Slip. Op. 01–123)

KRUPP THYSSEN NIROSTA GMBH AND KRUPP HOESCH STEEL PRODUCTS,
INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND ALLEGHENY LUDLUM
CORP., ET AL., DEFENDANT-INTERVENORS

Court No. 99–08–00550

(Dated October 22, 2001)

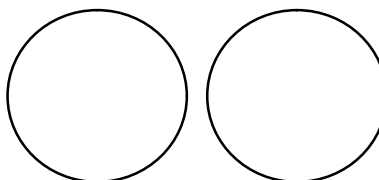
JUDGMENT

BARZILAY, *Judge*: Upon consideration of Plaintiffs' motion for judgment upon the agency record, Defendant's memorandum in partial opposition to the motion, and other relevant papers, it is hereby

ORDERED that judgment is entered sustaining the Department of Commerce's *Results of Redetermination Pursuant to Second Court Remand*, filed with the court on September 14, 2001, in *Final Determination of Sales at Less than Fair Value; Stainless Steel Sheet and Strip in Coils from Germany*, 64 Fed. Reg. 30710 (June 8, 1999), as amended, 64 Fed. Reg. 40557 (July 27, 1999), and modified by *Remand Determination in Stainless Steel Sheet and Strip in Coils from Germany*, (October 30, 2000) and, it is further

ORDERED that Defendant shall publish notice of the *Results of Redetermination Pursuant to Second Court Remand in the Federal Register* within ten (10) days of the date of this Order; and it is further

ORDERED that any change in the deposit rate must await a final court decision adjudicating the legality of the challenged determination.



U.S. COURT OF INTERNATIONAL TRADE

87

(Slip Op. 01-124)

SKF USA INC., SKF GMBH, FAG KUGELFISCHER GEORG SCHAFFER AG, AND
FAG BEARINGS CORP., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.*
UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-
INTERVENOR AND PLAINTIFF, AND NTN BEARING CORP OF AMERICA, NTN
KUGELLAGERFABRIK (DEUTSCHLAND) GMBH, AND SNR ROULEMENTS,
DEFENDANT-INTERVENORS

Consolidated Court No. 97-01-00054-S

(Dated October 22, 2001)

JUDGMENT

TSOUCALAS, *Senior Judge*: This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") Final Results of Redetermination Pursuant to Court Remand, *SKF USA Inc. v. United States*, 25 CIT ____, 155 F. Supp. 2d 813 (2001) ("Remand Results"), and Commerce having complied with the Court's remand order and no responses to the Remand Results having been submitted by the parties, it is hereby

ORDERED that the Remand Results filed by Commerce on October 16, 2001, are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

